Government
of Canada

THE REPORT
OF THE INQUIRY INTO
HABITUAL CRIMINALS
IN CANADA

THE HONOURABLE JUDGE STUART M. LEGGATT

Canada

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Much of the credit for the initial work on the subject of habitual offenders goes to Professor Michael Jackson of the University of British Columbia. His efforts to see some relief provided in cases of obvious injustice and his relentless attempts to help those in less fortunate circumstances are laudable. His very keen legal acumen and his compassionate nature became a happy conspiracy for the benefit of a great many of those who have been incarcerated. Professor Jackson was also instrumental in co-ordinating a team of defence counsel for the Province of British Columbia.

We also very much appreciated the assistance of the legal aid co-ordinators in Ontario, David Cole, and in Manitoba, Judy Elliot.

Logistics, scheduling and general administration of the Commission was handled by Ms. Sharon Vance with efficiency and competence. Her long-time interest in penology made her counsel invaluable, as was her contribution to the final Report.

Doreen Gracey, the Inquiry secretary, took charge of our offices while we travelled outside of Western Canada and her unfailing cheerfulness and optimism were most helpful.

Donald J. Sorochan took on the onerous task of organizing the format for the hearing process. He prepared all the files for the English speaking provinces and with great ability handled the Commission counsel duties through the larger part of our hearing process. In addition to this, he assisted in the preparation of the final report, particularly with reference to the history and background of the habitual legislation and the pardon power.

Maitre Serge Menard was Commission counsel for Quebec. His advice, counsel and tremendous work in the file preparation and the hearing process was essential to the Commission's deliberations. Some of our most difficult cases arose in that province and his assistance was invaluable to the Inquiry.

The practical advice and legal assistance provided by both our counsel made our Report possible.

The Inquiry was served by a team of excellent senior Crown counsel provided by the respective Attorneys General of the provinces. Their review of the files and their opinions with respect to the subjects were absolutely necessary to us in the hearing process. Two Crown counsel, Mr. Colin Sweeney, Vancouver, and Maitre Pierre Sauve, Montreal, must be singled out because of the large number of cases they handled and the degree of difficulty of these cases. We thank the Attorneys General of the provinces for assigning such competent counsel.

We are also especially indebted to Professor R. Price, Q.C., of Queens University for his research and work on the problems inherent in the habitual legislation.

The Inquiry would also like to acknowledge and thank the Chief Justices of Quebec, Ontario, Manitoba, Alberta and British Columbia for their assistance in providing us with court room space for our hearings.

Last, but not least, it would be impossible for us to have made decisions in the 87 cases which came under review without the assistance of the Parole Board and Parole Service. They provided co-operation throughout and assisted in many cases by providing background information on their clients. Ms. Kathy Louis, the senior Parole Board member for the Pacific Region and the staff of the National Parole Board, Pacific Region, were particularly helpful.

PREFACE AND OVERVIEW

The Honourable Judge Stuart M. Leggatt of the County Court of Vancouver in the Province of British Columbia, was granted a leave of absence from his judicial duties on August 1, 1983, for the purpose of inquiring into and reviewing the status of the habitual criminals in Canada, an Inquiry jointly appointed by the Minister of Justice and the Solicitor General of Canada.

The terms of the Inquiry into Habitual Criminals in Canada were to:

(i) inquire into and review the cases of each of the 93 persons still having the status of habitual criminal under the terms of legislation repealed by Parliament in 1977, with a view to determining which habitual criminals no longer present a danger to the personal safety of others having regard for the criteria and philosophy set out in Part XXI of the Code;

(ii) make recommendations in each case to the Minister of Justice and the Solicitor General of Canada, as to whether or not the habitual criminal should be granted relief from continued preventive detention; and

(iii) identify and recommend to the Minister of Justice and the Solicitor General of Canada the most appropriate and expeditious mechanism for granting relief in the appropriate cases.

The Inquiry consisted of:

Commissioner:	The Honourable Judge Stuart M. Leggatt
Inquiry Counsel:	Mr. Donald J. Sorochan Maitre Serge Menard
Administrator:	Sharon Vance
Inquiry Secretary:	Doreen Gracey

Those who appeared on behalf of the Crown in each province and as counsel to the habituals were as follows:

British Columbia

Crown Counsel:	Mr. Colin Sweeney
Counsel for the Subjects:	Professor Michael Jackson Ms. Angela Bartram Ms. Judi Gedye Ms. Ann Rounthwaite

Alberta

Crown Counsel:	Mr. Yaroslav Roslak Mr. Michael Watson
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Counsel for the subjects:	Mr. Elliot Starer Mr. James Crane Mr. Gary Moran Mr. Stan Loewen

Manitoba

Crown Counsel: Mr. Robert Gosman

Counsel for the subjects: Ms. Judy Elliott

Ontario

Crown Counsel: Mr. E. Howell

Counsel for the subjects:
Mr. R. Price, Q.C.
Ms. Charlene Mandell
Mr. Fergus O'Connor
Mr. David Cole
Mr. Robert Bigelow

Quebec

Crown Counsel: Mr. Pierre Sauve

Counsel for the subjects:
Ms. Daniele Roy
Mr. Jean Paul Perron
Mr. Allan Guttman
Mr. Alan Parvu
Mr. Christian Desrosiers
Mr. R. LeHaye
Mr. C. Girouard
Mr. A. Sosna
Ms. Michlene St. Laurent
Mr. Edward Mattey
Ms. Dominque LaRose
Mr. Franklin Shoofey
Ms. Danielle Girard

Nova Scotia

Crown Counsel: Mr. Kenneth Fisk

Counsel for the subjects: Mr. David Green

HEARINGS

The Inquiry had a total of 87 hearings across Canada. These were held in Halifax, Montreal, Kingston, Toronto, Winnipeg, Prince Albert, Edmonton and Vancouver. All of the offenders were represented by counsel as were the Attorneys General of each province. The Inquiry had its own counsel.

In the cases of three habituals in British Columbia who were on parole discharge status, their hearings were held in the Inquiry offices and only the Inquiry counsel was present.

Some of the hearings were held In Camera where the need for privacy outweighed the public interest. This was particularly true in the case of persons who had reformed and re-established themselves in the community.

With the exception of the very few In Camera cases, all hearings were open to the public. It was felt that no meetings were needed to solicit the views of the general public as the principal purpose of the Inquiry was to deal with the subject of individual relief rather than an academic study of the habitual criminal legislation or indeterminate sentencing.

The Inquiry visited the Robson Community Correctional Centre in Vancouver, as well as the Cordova House, a centre for alcoholics. Both of these facilities provide accommodation and programs for some of the habitual criminals upon their release.

BACKGROUND

The youngest habitual offender was [redacted] who is now 37 years of age. The oldest were [redacted]

Of the 87 cases reviewed, 56 of the individuals were on full parole, 4 were on parole discharged and 27 were either in custody or under the jurisdiction of the correctional service. The current average age of those reviewed was 59, much older than the normal criminal population.

If the recommendations of this Inquiry are adopted, 73 of the 87 reviewed would be immediately removed from both the correctional and parole service jurisdictions and given complete freedom.

Of the 27 who were incarcerated or under correctional jurisdiction at the time of the hearings, 15 would be released.

FINDINGS

The great majority of those men whom we have studied and reviewed can be classified as no more than grave social nusiances. They have never been regarded as dangerous. A good number of those that we reviewed argued that their sentences were, in effect, life sentences and they had observed persons convicted for murder admitted and released during the period of time that they themselves were still serving the habitual sentence. This created deep resentment in many cases and rendered the task of the correctional service more difficult.

Often, the habitual offenders have been detained in prison or returned to prison, not because of further offences but because of failure to abide by conditions regulating non-criminal activities such as abstaining from alcohol.

We found that alcohol and/or drug abuse played a major role in the criminal activities of at least 53 of the subjects reviewed. The evidence before the Inquiry was that alcohol or drugs was a contributing factor in the crimes of 61% of those who have been declared to be habitual criminals (17% can be attributed to drug abuse and 44% to alcoholism). Studies have shown that admissions to prisons due to alcohol related offences account for longer total periods of incarceration than do thefts, possession of stolen goods and breaking and entering combined. The number of subjects who have turned to crime and ruined their lives as an indirect result of alcohol abuse is staggering.

There is also no question that in a number of cases the length of an offender's detention is directly related to his obstreperous and aggressive attitude towards authority and supervision. However, I have found the length of time served by many of those declared to be habitual criminals is disproportionate to the harm or damage they have done and to the risk of further harm or damage which they may pose to the public.

There is, as well, no doubt, as was found by the Ouimet Committee report, that the habitual legislation was used in an arbitrary fashion throughout the country. This resulted in resentment and a sense of injustice and distrust of the system from those who were so classified.

There is little question that the retributive aspect of the habitual law went beyond even the expectations of those who prosecuted them.

REHABILITATION

Only 11 of the 87 habitual offenders had no further offences since their indeterminate sentences. This would lead to the conclusion that this type of sentence has little deterrent effect on further misconduct. In fact, in some it even had the effect of turning the subject, who was anti-authority to begin with, into a person who was more bitter and determined to live his life as a social misfit and, therefore, more likely to continue a criminal lifestyle on release. The only consistent evidence that we could find with regard to rehabilitation is that the advanced age of the subject becomes a great leveller and at some point the effort put forward to commit crime simply becomes too much.

Other reasons for an offender's change in criminal behaviour pattern also emerge from the study. Certainly the discovery of a satisfactory life partner, sufficiently persuasive and supportive in assisting in changing the lifestyle of the offender, was a key factor in several of the cases. And, of course, where the criminal behaviour was alcohol or drug related, successful alcohol or drug rehabilitation programs played an essential role.

We now must face the question of whether the primary goal of protection of the public has been attained with regard to the indeterminate sentence. Whether the public would have been protected if definite sentences were imposed rather than indeterminate sentences is a question about which one can only make an educated guess. The difficulty with the indeterminate sentence is that institutional conduct very often is inconsistent with conduct outside the institution. In other words, an institutionalized inmate may conduct himself successfully and well inside but may still be a danger to others outside, and vice versa, yet institutional performance is one of the principal criteria for his making parole.

This problem of inconsistency is particularly pertinent to subjects serving indeterminate sentences. Because of sentences previously served, the process of institutionalization has already begun and renders the subjects facing the potential of an indeterminate life sentence much less likely to succeed on parole. Yet parole has been the only light at the end of the tunnel for the habitual offender. In my view, the normal parole eligibility process and the definite sentence are more likely to result in both public protection and rehabilitation to the offender.

While punishment is a deterrent for some people and for some crimes, there does not seem to be any applicable cause and effect relationship for the habitual offender. Certainly in the early history of the subjects we have reviewed, punishment did not act as a deterrent to further criminal offences. There does not appear to be any definitive evidence that increasing the severity of the punishment by the use of the indeterminate sentence resulted in a decrease in criminal behaviour.

PREDICTING DANGEROUSNESS

Part of the terms of reference of the Commission are "to determine which habitual criminals no longer present a danger to the personal safety of others having regard for the criteria and philisophy set out in Part XXI of the Code". This, of necessity, leads us into this difficult area of predicting dangerousness.

The Inquiry accepts the conclusions of the University of Toronto report from the Centre of Criminology - "Deciding Dangerousness: Policy Alternatives for Dangerous Offenders", which points out the futility of basing predictions of dangerousness on a psychiatric evaluation. The conclusion reached is that the best predicter of dangerousness lies in the past conduct and record of the subject. This, taken with the mellowing impact of the aging process, seems to us to be the best criteria for determining the future dangerosity of the individual. The age of the subject is generally a positive consideration in most of the cases; the time elapsed since the last criminal offence having any element of violence or potential for violence was also a very serious consideration. Elements of brutality in offences also play an important role in any conclusions reached.

RELIEF

The offenders reviewed fall into three categories. The first is composed of those who are not now candidates for dangerousness proceedings and do not present a danger to the personal safety of others having regard for the criteria and philosophy of Part XXI of the Criminal Code. This involves 73 individuals.

The second category comprises those who do not present themselves as candidates for proceedings pursuant to Part XXI of the Criminal Code based upon their records, but who do present a danger to the personal safety of others. Involved in this category are 9 persons.

The third category consists of those who present themselves as candidates for dangerousness proceedings and represent a danger to the personal safety of others, having regard to the criteria and philosophy of Part XXI of the Criminal Code. This involves 5 persons.

Consideration was given to providing a conditional pardon with revocation provisions should the conditions of the pardon be violated. This solution was rejected because it would result in the reinstatement of a condition (habitual criminal) no longer provided for in the Criminal Code. In addition to this, it would have required a special form of monitoring which in the circumstances of these subjects was inappropriate.

Our recommendation is that relief should be automatic and immediate after the expiration of the period stated, provided there are no further convictions for serious personal injury offences, as defined in Part XXI of the Criminal Code, or charges pending for such offences during the period specified. Eight of the 87 subjects reviewed have been recommended for relief only after the expiration of a specific period of time.

POST RELEASE

In many of the cases special needs will have to be met and we have made some specific recommendations in individual cases. I would recommend generally that an appropriate budget be allocated through the Ministry of the Solicitor General for this purpose and that a team of qualified correctional personnel coordinate post release assistance for each individual.

I do not recommend the creation of special treatment facilities for this purpose. Such assistance can be provided through existing agencies such as the John Howard Society and Alcoholica Anonymous.

CHAPTER 1

BACKGROUND

In 1947, Canada enacted legislation aimed at habitual criminals.[1] The legislation was contained in the former Part X(A) and was adopted largely, but not entirely, from the Prevention of Crime Act, 1908 (U.K.) c.59, ss.10-16. The new law provided as follows:

> 575A. In this Part unless the context otherwise requires, 'judge' means a judge acting under Part XVIII of this Act and any judge having criminal jurisdiction in the province;
>
> 575B. Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.
>
> 575C.(1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,
>
> > (a) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part and that

he is leading persistently a criminal life; or,

(b) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(2) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

(3) In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the judge or jury, as the case may be, unless he thereafter pleads guilty to being a habitual criminal, the judge or jury shall be charged to enquire whether or not he is a habitual criminal and in that case it shall not be necessary to swear the jury again.

(4) A person shall not be tried on a charge of being a habitual criminal unless

(a) the Attorney-General of the province in which the accused is to be tried consents thereto; and

(b) not less than seven days' notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

575D. Without prejudice to the right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted on the question whether the accused is or is not leading persistently a criminal life.

575E. A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, and the provisions of this Act relating to an appeal from a

> conviction for an indictable offence shall be applicable thereto.
>
> 575F. Where a person has been sentenced, whether before or after the commencement of this Part, to imprisonment of five years or upwards and has been sentenced to preventive detention under this Part, the Crown may, at any time commute the whole or any part of the residue of the sentence to a sentence of preventive detention under this Part.
>
> 575G.(1) The sentence of preventive detention shall take effect immediately on the conviction of a person on a charge that he is a habitual criminal.
>
> (2) Persons undergoing preventive detention may be confined in a prison or part of a prison set apart for that purpose.
>
> (3) Persons undergoing preventive detention shall be subjected to such disciplinary and reformative treatment as may be prescribed by the prison regulations.
>
> 575H. The Minister of Justice shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, review the condition, history and circumstances of that person with a view to determining whether he should be placed out on license, and if so, on what conditions.

The new law provided for preventive detention of habitual criminals. In 1948, the former s.1054A of the Criminal Code was enacted,[2] which provision provided for the preventive detention of criminal sexual psychopaths. Legislative amendments in intervening years made changes to both the habitual criminal and criminal sexual psychopath provisions, by merging them into one part of the Code and by making some changes of substance.

For example, s.575C of the original habitual criminal legislation provided that a jury was the tryer of fact as to whether or not the accused was found to be an habitual criminal. Subsequent amendments provided that an application for a sentence of preventive detention of an habitual criminal must be heard by a court without a jury.[3]

The habitual criminal provisions and the criminal sexual psychopath provisions were merged in Part XXI of the Criminal Code and the description of the sexual offenders subject to preventive detention was changed to "dangerous sexual offender". Part XXI of the Criminal Code continued to provide for preventive detention of habitual criminals and dangerous sexual offenders in ss.687 to 695 of the Criminal Code until the provisions were repealed by the dangerous offender provisions provided for in the Criminal Law Amendment Act, 1977.[4] The 1977 Criminal Law Amendment Act provided for the preventive detention of dangerous offenders and was proclaimed in force October 16, 1977.

Part XXI of the Criminal Code at the time of its repeal provided as follows:

> ## PART XXI
> ## PREVENTIVE DETENTION
>
> ### Interpretation
>
> DEFINITIONS - "Court" - "Dangerous sexual offender" - "Preventive detention".
> 687. In this Part
> "court" means
>
> (a) a superior court of criminal jurisdiction, or
>
> (b) a court of criminal jurisdiction;
>
> "dangerous sexual offender" means a person who, by his conduct in any sexual

matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses;

"preventive detention" means detention in a penitentiary for an indeterminate period. 1953-54, c.51, s.659; 1960-61, c.43, s.32; 1968-69, c.38, s.76.

Habitual Criminals

APPLICATION FOR PREVENTIVE DETENTION - Who is habitual criminal.

688. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence for which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if

(a) the accused is found to be an habitual criminal, and

(b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(b) he has been previously sentenced to preventive detention. 1953-54, c.51, s.660; 1960-61, c.43, s.33; 1968-69, c.38, s.77.

Dangerous Sexual Offenders

EVIDENCE OF SEXUAL OFFENCE - Evidence of psychiatrists - Sentence of preventive detention.
689. (1) Where an accused has been convicted of

(a) an offence under section 144, 146, 149, 155, 156 or 157; or

(b) an attempt to commit an offence under a provision mentioned in paragraph (a),

the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.

(2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

(3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired. 1960-61, c.43, s.34; 1968-69, c.38, s.78.

General

NOTICE OF APPLICATION - Hearing of application - When proof unnecessary - Where application not heard before sentence - Proof of nomination.
690. (1) The following provisions apply with respect to the applications under this Part, namely,

(a) an application under subsection 688(1) shall not be heard unless

(i) the Attorney General of the province in which the accused is to be tried consents,

(ii) seven clear days notice has been given to the accused by the prosecutor, either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

(iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be; and

(b) an application under subsection 689(1) shall not be heard unless seven clear days notice thereof has been given to the accused by the prosecutor either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined by the court without a jury.

(3) For the purposes of section 688, where the accused admits the allegations contained in the notice referred to in paragraph (1)(a), no proof of those allegations is required.

(4) Where an application under subsection 688(1) or 689(1) has not been heard before the accused is sentenced for the offence for which he has been convicted, the application shall not be heard by the judge or magistrate who sentenced the accused but may be heard by any other judge or magistrate who might have held or sat in the same court.

(5) The production of a document purporting to contain any nomination or consent that

may be made or given by the Attorney General under this Part and to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of such nomination or consent, 1959, c.41, s.30; 1960-61, c.43, s.35; 1968-69, c.38, s.92.

PRESENCE OF ACCUSED AT HEARING OF APPLICATION - Exception.
691. (1) The accused shall be present at the hearing of an application under this Part and if at the time the application is to be heard

(a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or

(b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XIV relating to summons and warrant are applicable *mutatis mutandis*.

(2) Notwithstanding subsection (1) the court may

(a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or

(b) permit the accused to be out of court during the whole or any part of the hearing on such conditions as the court considers proper. 1968-69, c.38, s.79.

EVIDENCE OF CHARACTER AND REPUTE.
692. Without prejudice to the right of the accused to tender evidence as to his character and repute, evidence of character and repute may, where the court thinks fit, be admitted on the question whether the accused is or is not persistently leading a criminal life or is or is not a dangerous sexual offender, as the case may be. 1960-61, c.43, s.36.

PRISON SET APART.
693. An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformative treatment as may be prescribed by law. 1953-54, c.51, s.665; 1960-61, c.43, s.38.

REVIEW BY NATIONAL PAROLE BOARD.
694. Where a person is in custody under a sentence of preventive detention, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act, and if so, on what conditions. 1958, c.38, s.24(5); 1960-61, c.43, s.39; 1966-67, c.25, s.45.

APPEAL - Appeal by Attorney General - Disposition of appeal - Idem - Effect of judgment - Part XVIII applies re appeals.
695. (1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.

(3) On an appeal against a sentence of preventive detention the court of appeal may

(a) quash such sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or order a new hearing; or

(b) dismiss the appeal.

(4) On an appeal against the dismissal of an application for an order under this Part the court of appeal may

(a) allow the appeal, set aside any sentence imposed in respect of the

> offence for which the respondent was convicted and impose a sentence of preventive detention, or order a new hearing; or
>
> (b) dismiss the appeal.
>
> (5) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.
>
> (6) The provisions of Part XVIII with respect to procedure on appeals only, *mutatis mutandis*, to appeals under this section. 1953-54, c.51, s.667; 1960-61, c.43, s.40; 1968-69, c.38, s.80.

The new Part XXI of the Criminal Code created by the *Criminal Law Amendment Act*, 1977 no longer provided for the preventive detention of an habitual criminal, but rather provided for such preventive detention for criminals who were found to be dangerous in accordance with criteria set forth in the new Part XXI. The new Part XXI provided:

> PART XXI
> DANGEROUS OFFENDERS
> Interpretation
>
> 687. In this Part,
> "court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;
> "serious personal injury offence" means
>
> (a) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).

Dangerous Offenders

688. Where, upon an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 687 and the offender constitutes a threat to the life, safety or physical or mental well-being of other person on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damages upon other persons, through failure in the future to restrain his behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or

(b) that the offence for which the offender has been convicted is a serious person injury offence described in paragraph (b) of the definition of that expression in section 687 and the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,

the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted.

689. (1) Where an application under this Part has been made, the Court shall hear and determine the application except that no such application shall be heard unless

(a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application;

(b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and

(c) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be.

(2) An application under this Part shall be heard and determined by the court without a jury.

(3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.

(4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

690. (1) On the hearing of an application under this Part, the court shall hear the evidence of at least two psychiatrists and all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender.

(2) One of the psychiatrists referred to in subsection (1) shall be nominated by the prosecution and one shall be nominated by the offender.

(3) If the offender fails or refuses to nominate a psychiatrist pursuant to this section, the court shall nominate a psychiatrist on behalf of the offender.

(4) Nothing in this section shall be construed to enlarge the number of expert witnesses that may be called without the leave of the court or judge under section 7 of the Canada Evidence Act.

691. (1) A court to which an application is made under this Part may, by order in writing,

(a) direct the offender in relation to whom the application is made to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(b) remand the offender in such custody as the court directs, for a period not exceeding thirty days, for observation,

where in its opinion, supported by the evidence of, or where the prosecutor and the offender consent, supported by the report in writing of, at least one duly qualified medical practitioner, there is reason to believe that evidence might be obtained as a result of such observation that would be relevant to the application.

(2) Notwithstanding subsection (1), a court to which an application is made under this Part may remand the offender to which that application relates in accordance with that subsection

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the offender and give evidence or submit a report; and

(b) for a period of more than thirty but not more than sixty days where it is satisfied that observation for such a period is required in all the circumstances of the case and its opinion is supported by the evidence of, or where the prosecutor and the offender consent, by the report in writing of, at least one duly qualified medical practitioner.

692. Without prejudice to the right of the offender to tender evidence as to his character and repute, evidence of character may, if the court thinks fit, be admitted on the question whether the offender is or is not a dangerous offender.

693. (1) The offender shall be present at the hearing of the application under this Part and if at the time the application is to be heard

(a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or

(b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XIV relating to summons and warrant are applicable mutatis mutandis.

(2) Notwithstanding subsection (1), the court may

(a) cause the offender to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or

(b) permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper.

694. (1) A person who is sentenced to detention in a penitentiary for an indeterminate period under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.

(3) On on appeal against a sentence of detention in a penitentiary for an indeterminate period the court of appeal may

(a) quash such sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or order a new hearing; or

(b) dismiss the appeal.

(4) On an appeal against the dismissal of an application for an order under this Part the court of appeal may

(a) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of detention in a penitentiary for an indeterminate period, or order a new hearing; or

(b) dismiss the appeal.

(5) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.

(6) Notwithstanding subsection 649(1), a sentence imposed on an offender by the court of appeal pursuant to this section shall be deemed to have commenced when the offender was sentenced by the court by which he was convicted.

(7) The provisions of Part XVIII with respect to procedure on appeals apply, mutatis mutandis, to appeals under this section.

695. Where a court, pursuant to section 688, finds an offender to be a dangerous offender and imposes a sentence of detention in a penitentiary for an indeterminate period, the court shall order that a copy of all reports or testimony given by psychiatrists, psychologists or criminologists and any observations of the court with respect to the reasons for the sentence, together with a transcript of the trial of the dangerous offender be forwarded to the Solicitor General of Canada for his information.

695.1(1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, forthwith after the expiration of three years from the date on which that person was taken

> into custody and not later than every two years thereafter, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act and, if so, on what conditions.
>
> (2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before the Criminal Law Amendment Act, 1977 came into force, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act and, if so, on what conditions.

During the thirty-year period in which the habitual criminal provisions were in existence, 173 persons were declared to be habitual criminals and sentenced to preventive detention. Table 1 shows a breakdown of the number of habitual criminals by regions in ten-year periods from 1948 to 1976.

When the dangerous offender legislation was proclaimed in 1977, a large number of those who had been declared habitual criminal in the preceding thirty years remained in custody. Transitional provisions of the Criminal Law Amendment Act, 1977 provided as follows, with respect to these individuals:

> 15. (2) Sections 693 to 695 of the Criminal Code, as enacted by section 14 apply to a person who, before the coming into force of that section, was sentenced to preventive detention under Part XXI of the Criminal Code as if the references in those sections to "a sentence of detention in a penitentiary for an indeterminate period" were references to "a sentence of preventive detention". In addition, section 695.1(2), as previously quoted, made provision for an annual review by the Parole Board of those persons who were in custody under a sentence of detention for an indeterminate period that was imposed

TABLE 1

HABITUAL CRIMINALS SENTENCED TO PREVENTIVE DETENTION BY YEAR AND REGION OF SENTENCING, CANADA, 1948 - 1976

REGION OF SENTENCING	HABITUAL CRIMINALS			
	TOTAL	1948-1957	1958-1967	1968-1976
CANADA	173	52	80	41
MARITIMES	6	4	2	0
QUEBEC	36	2	6	28
ONTARIO	19	13	2	4
PRAIRIES	39	20	14	5
BRITISH COLUMBIA	73	13	56	4
YUKON AND NORTHWEST TERRITORIES	0	0	0	0

PREPARED BY: Information Systems and Statistics Division, Ministry of the Solicitor General, August 1977. Figure 4.9 - Statistics Handbook, 1977.

SOURCE: National Parole Service

> before the Criminal Law Amendment Act, 1977. Persons who were found to be dangerous offenders under the 1977 legislation were to be reviewed by the Parole Board after the expiration of three years and every two years thereafter.

The result of these provisions is that the survivors of those 173 persons who were declared to be habitual criminals and sentenced to preventive detention between 1947 and 1977 continued to be subject to the same custodial and parole supervision as they were prior to the amendment.

Prior to the enactment of the Criminal Law Amendment Act, 1977, the provisions (which were then contained in Bill C-38) were studied by the Standing Committee on Justice and Legal Affairs of the House of Commons, which Committee was chaired by the present Minister of Justice, Dr. Mark MacGuigan, and upon which Committee I, in my then capacity as a Member of Parliament and Justice critic, served.

Members of Parliament serving on the Committee were concerned about the type of review and the criteria for review of those habitual criminals who were subject to the old legislation and would continue to be subject to the legislation proposed in Bill C-38. The then Minister of Justice, Mr. Basford, was questioned as follows:[5]

> Mr. Lachance: A very short question, Mr. Chairman. With the questioning, we tend to forget that this bill has four parts, not only gun control and wiretapping but also something about dangerous criminals, and my question relates to dangerous criminals. I would just like to know what process will be involved for sexually dangerous or dangerous criminals already detained in institutions under the old provisions to apply for review under the bill as it is going to be passed, I suppose. What process have you envisaged in this respect. What delays will there be in having

those applications forwarded, either forwarded to those persons already detained or in giving the criminals access to the courts or the parole board? How do you intend to proceed with this?

Mr. Basford: It was undertaken that on passage of this bill the parole board would review all cases of those dangerous sexual offenders or habitual criminals now incarcerated, and would review them in accordance with the proposed Clause 695.1(2):

> '(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before the Criminal Law Amendment Act, 1977...
>
> ...the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act and, if so, on what conditions.'

Mr. Lachance: Yes, I know about this proposed Clause 695.1(2) and this applies, of course, to those persons whose cases will have been started and reviewed at some later time if it has been refused. Have you had any talks with the Parole Board to determine, first of all, the number of persons in custody at the moment who would be touched by this provision? What kind of delay do they envisage in studying all of those cases and finding out if all those persons already in custody conform with the new criteria that have been developed in Bill C-51 so that they can eventually be released if they do not fall into the new categories? The same provision was in C-83, and many persons in this situation in penitentiaries are anxious to avail themselves of those new provisions. It has already been delayed for more than a year and they would like to know when they will have a chance to have their cases reviewed.

Mr. Basford: I can only undertake that the two provisions contained in here for review

> will be reviewed forthwith to determine if they would fall into the category of dangerous offender as formulated in Bill C-83. That obviously does not mean that parole will automatically follow, but that their cases will be reviewed forthwith by the Parole Board in light of the new provisions and the new definitions. Just how quickly 'forthwith' is I am not able to tell you. I would ask you to ask Mr.Fox that question. I am not briefed on how quickly the Parole Board would be able to review all of these cases, simply that they will review them forthwith in light of the new legislation.
>
> (My emphasis added.)

On June 21, 1977, Clause 14 of Bill C-38, which clause contained the proposed dangerous offender legislation, was presented for approval to the Justice and Legal Affairs Committee. The proceedings were as follows:[6]

> On Clause 14 - Dangerous Offenders
>
> The Chairman: We now come to Clause 14, which is dangerous offenders, and the minister might like to give us some preamble.
>
> Mr. Basford: These new sections on dangerous offenders are designed to replace the present provisions of the Code relating to habitual criminals and dangerous sexual offenders and to repeal those sections and to create a new kind of offence calling for an indefinite sentence for a dangerous offender.
>
> The procedure proposed is carefully defined in Section 687. Upon conviction for a serious personal injury offence an application can be made showing the elements in Section 688; that this personal injury offence constitutes a pattern of repetitive behaviour, of which the offence is a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons or inflicting severe psychological damage upon other persons, through failure in the

future to restrain his behaviour, et cetera. Upon the application being made for the dangerous offender application, there is a hearing to which both the Crown and the accused must call evidence as to the nature of the accused and the accused, of course, presents rebuttal evidence as to his state of mind. It allows for incarceration during the hearing and allows a judge to order examination.

The Criminal Code related to the calling of psychiatrists has been enlarged to include criminologists. After the hearing the judge may do two things. He may give the sentence prescribed in the Code for the serious personal injury offence, only a fixed sentence, the traditional sentence, or he may make a determination that the person is a dangerous offender and give him an indeterminate sentence, in which case it is reviewable. First it is appealable by the accused, both as to fact and law or mixed fact and law, and is reviewable by the parole board every three years.

Mr. Woolliams: I have one question as soon as the Minister is finished.

Mr. Basford: It is just the review. One member I think may want to move an amendment. It is reviewable in the first three years and then every two years thereafter. Then there were questions about those already in the penitentiaries as dangerous sexual offenders or habitual criminals. They are covered by the old Code, but as a matter of policy their cases will be reviewed once a year. They will be reviewed on the basis by the parole board against the new formulation of what a dangerous offender is. That does not obviously guarantee that they will be paroled, but it does mean that their cases will be reviewed in accordance with the new standard.

Mr. Woolliams: But they have the power to parole them.

Mr. Basford: Yes, which they have now.

(My emphasis added.)

I am certain that other members of the Committee and other Members of Parliament shared the same impression that I did with respect to the type of review and the criteria for review that would apply to those habitual criminals that were left over from the old legislation. It was anticipated that those individuals would be reviewed by the Parole Board against the new criteria of dangerousness contained in the dangerous offender legislation, and that if the habitual criminal could not be found to be dangerous measured against that criteria, he would be paroled. No such review of the habitual criminals against the criteria set forth in the present Part XXI of the Criminal Code has been conducted until this Inquiry. No legislative authority was given the Parole Board for such a review.

There was considerable frustration on the part of the habitual criminals when the National Parole Board did not assess their cases against the criteria in the new Part XXI. The Parole Board assessed the habitual criminals with the same criteria that it uses to assess any other offender who is being considered for parole. That is the criteria set forth in s.10 of the Parole Act, which reads as follows:

> POWERS OF BOARD
>
> 10.(1) The Board may
>
> (a) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that
>
> (i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment,
>
> (ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and

> (iii) **the release of the inmate on parole would not constitute an undue risk to society;**

The Parole Board, in assessing the cases of those habitual criminals who had been sentenced to preventive detention under the repealed legislation, focused on whether the release of the inmate would "constitute an undue risk to society". That risk did not have to be a risk of committing serious personal injury offences or offences that were otherwise dangerous as envisaged by the criteria in Part XXI, but rather focused on whether the inmate was likely, if released on parole, to re-offend in any manner, whether dangerous to the personal safety of members of the public or not.

I think it is safe to say that those of us who were members of the Justice and Legal Affairs Committee did not focus on this conflict between s.10 of the Parole Act and what we, as legislators, envisaged would happen to the habitual criminals.

The release of habitual criminals is only a part of the problem that occurred with those men who were left over from the old legislation. Section 10(1)(e) of the Parole Act gives the National Parole Board a complete discretion to revoke the parole of any paroled inmate other than a paroled inmate to whom discharge from parole has been granted. Those habitual criminals who were paroled were subject to revocation of the parole at the discretion of the Parole Board whether the conduct which was viewed as unacceptable by the Parole Board amounted to dangerous conduct or not.

The result of these policies of the Parole Board, and the failure of Parliament to provide any legislative instructions to the Parole Board to act in other than their normal procedures with respect to these men, resulted in many of the habitual criminals being in a "revolving door" situation. If released on a form of conditional release (and there are several of these, namely: unescorted temporary absence; day parole; full parole) they were often returned to incarceration when their conduct did not meet the standards required of them by the Parole Board.

Concerns began to be expressed about this situation, not only by the habitual criminals, but also by those professionals involved in corrections. In 1980, the British Columbia Corrections Association proposed a study of those habitual criminals who were still in prison in British Columbia penitentiaries. It was not surprising that these issues arose in British Columbia since that region contained far more habitual criminals than any other region as a result of the more vigorous use of the habitual criminal legislation during the thirty-year period of its existence. The 1980 study of the British Columbia Corrections Association involved an analysis of those men detained to determine whether they were dangerous. It was initiated under the chairmanship of Mr. Don Sorochan, the past President of the British Columbia Corrections Association, and was continued under the chairmanship of Professor Michael Jackson of the Faculty of Law of the University of British Columbia, a specialist in Canadian correctional law policy and adminstration.

Volunteer students from the Faculty of Law at U.B.C. participated in the project and obtained the written consent of every habitual criminal included in the study to the release of information in the possession of the Parole Board. The Parole Board co-operated and released file information with respect to the eighteen habitual criminals who were still in prison in British Columbia. This information was only part of the information considered by the study. The habitual criminals were interviewed, as were parole officers, institutional staff and others who had relevant information about the habitual criminals being reviewed.

Documentation was prepared for each of the eighteen habitual criminals studied, consisting of:

(1) a detailed chronological history of the man's experiences since being sentenced to preventive detention;

(2) a statistical summary of the man's criminal record; and

(3) a descriptive summary containing an analysis of his criminal record and parole file with a conclusion by the author as to whether or not the habitual criminal could be regarded as a dangerous offender within the 1977 legislation.

The findings of the study are summarized as follows:[7]

F. The Findings of the Study

(1) The majority of the men in the study have always been regarded as no more than serious social nuisances and have never been regarded as dangerous in terms of their propensity to commit violence;

(2) None of the men in the study can properly be regarded as dangerous offenders within the definition of the 1977 legislation;

(3) The Parole Board, in conducting its annual reviews since 1977, has not conducted those reviews against the new definition of a dangerous offender;

(4) Parole reviews of the men in the study, both before and after 1977, have been and are conducted against the legislative criteria of Section 10 of the Parole Act in which danger to society is only one of the relevant criteria;

(5) In a number of the cases in the study men have been detained in prison or have been returned to prison after being on parole, not because they have committed any further offences but because of a failure to abide by parole conditions regulating non-criminal activities;

(6) In a number of cases in the study men have been detained in prison or returned to prison after being on parole because of their attitude towards authority and supervision and not because of any further commission of criminal offences;

(7) In the majority of cases where men in the study have been returned to prison following the commission while on parole of further criminal offences, they have served, before any re-parole, a longer term of imprisonment than that to which they have been sentenced for the individual offence or offences;

(8) The length of time the men in the study have served as habitual criminals is greatly disproportionate to the harm or damage they have done and to the risk of further harm or damage which they may pose to the public. The men in the study have served more time than any other group of prisoners in Canada, including those convicted of murder;

(9) The men in the study have been the subject of a discriminatory and arbitrary application of the criminal law;

(10) The continued confinement of the men in the study under sentences of preventive detention is unnecessary measured against both the purposes of criminal punishment and the existence of adequate alternatives.

The final two findings of the study provided the foundation for habeas corpus proceedings instituted subsequently.[8] The Jackson report was approved and submitted by the British Columbia Corrections Association to the Minister of Justice, The Honourable Dr. Mark MacGuigan; the Solicitor General of Canada, The Honourable Robert Kaplan and to the Chairman of the National Parole Board of Canada, Mr. William Outerbridge. This report became the focus of much discussion relating to remedies which should be made available to the habitual criminals.

There are two individuals who have done much to develop correctional law in Canada. Their involvement can be seen, not only from the cases that bear their personal mark, but also from the cases of the many student they have interested in this area. They are, of course, Professor Michael Jackson of the Faculty of Law of the University of British Columbia and Professor Ronald Price, Q.C., of the Correctional Law Centre, Faculty of Law, Queens University in Kingston. While Professor Jackson was urging the responsible Ministers and officials to implement reforms suggested by his study, Professor Price commenced legal proceedings in the Ontario High Court seeking habeas corpus on behalf of one of the habitual criminals and a declaration that his continued detention violated the Charter of Rights.

By the latter part of June, Professor Jackson's initiatives had resulted in the Minister of Justice and the Solicitor General reaching the decision to hold an inquiry into the status of those habitual criminals who were sentenced under the legislation repealed in 1977. That decision was finalized with my appointment on July 8, 1983.[9]

On July 7, 1983, Mr. Justice Linden of the Ontario High Court rendered the first part of his decision relating to the habeas corpus application of Percy Mitchell. In that case, Mr. Justice Linden was asked by Mitchell for an order that he be released from custody on the basis that his continued detention and preventive detention as an habitual criminal was illegal. The full Reasons for Judgment of Mr. Justice Linden in this case are attached as a schedule to this report. Mr. Justice Linden stated:[10]

> ...I find that the continued detention of the applicant, if in fact he is no more than a social nuisance and not a danger to the public, satisfies the disproportionality test. To continue to detain such a man for more than twelve years surpasses all rational bounds of treatment or punishment, and is so excessive as to outrage standards of decency. The applicant's right to protection against cruel and unusual treatment or punishment thus may have been infringed. Since no evidence has been adduced to satisfy me that such an infringement constitutes a reasonable limit demonstrably justifiable in a free and democratic society, I find that the applicant may be entitled to relief pursuant to Section 24(1) of the Charter, subject to my comments below.

Mr. Justice Linden went on to hold that there must be a determination as to whether or not Mitchell was a danger to society, and that an order of habeas corpus or relief pursuant to s.24 of the Charter was not appropriate until such a hearing is conducted. He stated:[11]

> Although I am not prepared to grant the relief requested, namely, an order releasing the applicant from custody, neither am I prepared to dismiss his application. I have concluded that an alternative remedy open to me is to direct that the applicant remain in custody pending the trial of an issue to determine whether he is a danger to society

> within the meaning of Section 688 of the present Criminal Code. My jurisdiction in this regard is found in s.709 of the Code. Pursuant to s.709, a court hearing and application for habeas corpus has the power to order further detention of the applicant and to direct that further proceedings be taken to further the ends of justice.

Mr. Justice Linden ordered as follows:[12]

> VII Order
>
> The terms of my order are as follows. The applicant may apply to this court to fix a date for the continuation of proceedings before me, if, within sixty days from the date of this order the Parole Board has not released the applicant, and no appeal from this order has been commenced. At the continuation of this application, the onus shall be upon the applicant to establish that he is not a danger to society. The respondent shall have the right to participate fully in the proceedings. If the applicant succeeds in satisfying me that he is not dangerous, this court shall determine the appropriate remedy to be granted pursuant either to the application for a writ of habeas corpus, or the application for relief under s.24(1) of the Charter.

The Mitchell proceedings were continued before Mr. Justice Linden on October 21, 1983 and I have included the unreported Reasons for Judgment of Mr. Justice Linden on those proceedings as well as the formal order resulting therefrom as schedules to this report. After Mr. Justice Linden's ruling of July 7, the Parole Board reviewed Mitchell's detention but, once again, denied him parole. The Court reviewed the evidence of Mitchell's background, criminal record and then status, and held:[13]

> Weighing all the evidence, I am satisfied the applicant has demonstrated on a balance of probabilities that he is not dangerous according to the criteria contained in Section 688 of the present Criminal Code. Finding, as I do, that there is no indication whatsoever that the applicant has done anything violent, in the past 23 years, and that there is no danger of him doing violence to anyone in the future, I must conclude that his continued detention is disproportionate and thus in violation of Section 12 of the Charter of Rights. To continue to detain this man, who is no more than a 'social nuisance' for more than 12 years surpasses all rational bounds of treatment or punishment, and is so excessive as to outrage standards of decency. Such detention thus violates the applicant's constitutional right not to be subjected to cruel and unusual treatment or punishment.
>
> Accordingly, I hold that the applicant's continued detention is illegal and in contravention of the Charter of Rights. The appropriate remedy is to grant the applications for a writ of habeas corpus, and for relief pursuant to Section 24(1) of the Charter, and to order that the applicant be released as soon as the appropriate documents can be prepared and executed, and arrangements have been made for his return to his home in Montreal.

The judgment of Mr. Justice Linden has been most helpful to me in approaching the conduct of this Inquiry. Table 2 to this report summarizes the custodial status of the habitual criminals as of May 16, 1983 in the various regions of the country. It should be noted that, as the Inquiry was conducted, the National Parole Board continued its review of the habitual criminals and several who were incarcerated in May of 1983 were at large pursuant to a release program at the time of our study. The contrary was also true, however, in that several of those who were released from custody on a conditional release program in May of 1983 have been re-incarcerated because of breaches of parole conditions between that time and the date of our review. Table 2 does, however, give an indication of the relationship between those in custody and those on release programs at any given point in time.

For further background, see the following articles.[14]

TABLE 2

... Habitual Offenders

REGION	PRESENTLY INCARCERATED	RELEASE PROGRAMS			U.A.L.	TOTAL **
		Day Parole	Full Parole	Parole Reduced		
Atlantic	-	-	4	-	-	4
Quebec	6	3	12	1	2	24
Ontario	4	-	5	3	-	12
Prairies	3	1	9	1	-	14
Pacific	8	5	23	-	3	39
ALL CANADA	21	9	53	5	5	93

** 4 parole discharged figures not counted in this report)

SOURCE: OIS - CSC

PREPARED BY: Statistical Liaison Officer, NPB - May 16, 1983

FOOTNOTES - CHAPTER 1

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1 Section 18 of the Criminal Code Amendment Act, 1947, c.55 was assented to on July 17, 1947.

2 By 1948, c.39, s.43: Criminal Sexual Psychopaths.

3 Section 662(2) of the Criminal Code.

4 Criminal Law Amendment Act, 1977 (1976-77, c.53, s.14).

5 Proceedings of the Standing Committee on Justice and Legal Affairs of the House of Commons, Issue 22, pp.17-18 (June 16, 1977).

6 Proceedings of the Standing Committee on Justice and Legal Affairs, Issue 24, pp.56-57 (June 21, 1977).

7 Sentences That Never End: The Report of the Habitual Criminal Study of the British Columbia Corrections Association; Professor Michael Jackson (December, 1982).

8 See Re Mitchell and The Queen (1984) 6 C.C.C. (3d) 193.

9 P.C. 1983-2119 dated 8 July, 1983.

10 Ibid., (1984) 6 C.C.C. (3d) 193 at p.219.

11 Ibid., (1984) 6 C.C.C. (3d) 193 at p.220.

12 Ibid., (1984) 6 C.C.C. (3d) 193 at p.221.

13 Unreported Reasons for Judgment of Mr. Justice Allen Linden dated October 21, 1983 at p.6-7.

14 See the following articles:

Atkinson, P.Y. "The Persistent Offender in Canada." (1970), 9 Western Ont. L. Rev 75; Cohen, Joseph. "Criminal Law: Habitual Criminals, Part X(A) of the Old Criminal Code, Appeal by the Crown, Section 677(2) of the New Code, Sufficiency of Notice, Discretion of Judge, Comments on R. v. Ryan (1954), 19 C.R. 361." [1955] Can. Bar Rev. 461; Dombeck, C.F. and G.W. Tranmer. "The Indeterminate Sentence under the Prisons and Reformatories Act." (1977) 3 Queen's L.J. 332; French, Paul. "Criminal Law: Power of Court to Award Definite

Term of Imprisonment and Indeterminate Term Greater than Maximum Provided by Code: Code s.5(1)(b), s.231(2); Prisons and Reformatories Act s.46. Common on Anderson v. The Queen [1970] S.C.R. 843." (1971), 5 Ottawa L. Rev. 251; Greenland, C. "Dangerous Sexual Offenders in Canada." (1972), 14 Can. J. Corr. 44; Grosman, Brian A. "The Treatment of Habitual Criminals in Canada." (1966-67), 9 Cr. L.Q. 95; "The Habitual Criminal: A Comparative Study." (1967), 13 McGill L.J. 652; "The Habitual Criminal: Introduction, 13 McGill L.J. (Morris, N.); Harrington, Sean, and Donald Devine. "The Habitual Criminal: A Review of the Jurisprudence." (1967), 13 McGill L.J. 683; Klein, John F. "The Dangerousness of Dangerous Offender Legislation: Forensic Folklore Revisited." (1976), 18 Can. J. Crim. 109; Klein, John F. "Habitual Offender Legilsation and the Bargaining Process." (1972-73), 15 Cr. L.Q. 417; rpt. in Law and Social Control in Canada, ed. W.K. Greenaway and S.L. Brickey, Scarborough: Prentice Hall, 1978, p.42; MacDonald, John A. "A Critique of Habitual Criminal Legislation in Canada and England." (1969), 4 U.B.C.L. Rev. 87; Marcus, A.M. "Dangerous Sexual Offender Project." (1969), 11 Can. J. Corr, 198; Marcus, A.M. "A Multi-disciplinary Two Part Study of Those Individuals Designated Dangerous Sexual Offenders Held in Federal Custody in British Columbia, Canada." (1966), 8 Can. J. Corr. 90; Matlow, P.T. "Proof of previous convictions in habitual criminal applications." 1 C.R.M.S. 107; Mewett, Alan W. "Habitual Criminal Legislation Under the Criminal Code." (1961), 39 Can Bar Rev. 43; Mewett, Alan W. "The Suspended Sentence and Preventive Detention." (1958-59), 1 Cr. L.Q. 268; Popple, A.E. "Habitual Criminals." 6 C.R. 180; "Habitual Criminals." 6 C.R. 194; "Habitual Criminals." 9 C.R. 272; "Habitual Criminals." 11 C.R. 35, 139, 308; "Habitual Criminals." 12 C.R. 101; "Habitual Criminals." 14 C.R. 259; "Habitual Criminals." 16 C.R. 162; "Habitual Criminals." 19 C.R. 284; "Habitual Criminals." 20 C.R. 248; "Habitual Criminals." 21 C.R. 41; "Preventive Detention." 22 C.R. 393; "Habitual Criminals." 24 C.R. 279; "Habitual Criminals." 32 C.R. 363; "Habitual Criminal Procedure." 38 C.R. 115; "Habitual Criminals." 42 C.R. 1; "Habitual Criminal Applications." 44 C.R. 85; Price, Ronald R. "Psychiatry, Criminal Law Reform and the 'Mythophilic' Impulse: On Canadian Proposals for the Control of the Dangerous Offender." (1970-71), 4 Ottawa L. Rev. 1; Spring, David. "Criminal Law: Habitual Criminal. Crim. Code s.660. Mendrik v. The Queen, 6 D.L.R. 3rd 257". (1970-71), 4 Ottawa L. Rev. 318; Stortini, Ray. "Preventive Detention of Dangerous Sexual Offenders." (1975), 17 Cr. L.Q. 416; Van Rooy, H. "An Investigation into Habitual Offenders." 7 Can. J. Corr. 178.

CHAPTER 2

HISTORY

Habitual Criminal Legislation and the concept of preventive detention arose out of the report of an English Committee which studied penal reform in the latter part of the last century. The Gladstone Committee, named after its chairman, Mr. H.J. Gladstone, filed its report in 1895. Many significant reforms were introduced in the field of penology by the recommendations of that report.[1] A decade later Mr. Gladstone was the Home Secretary and as such had the responsibility of introducing numerous pieces of legislation into the Parliament of the United Kingdom which transformed the corrections system in that country. This legislation included the Probation of Offenders Act, 1907,[2] the Children Act, 1908,[3] and the Prevention of Crime Act, 1908.[4]

The reforms suggested by the Gladstone Committee were aimed at overcoming the failure of the then existing prison system to develop programs designed to reform young offenders. The English Borstal System developed as a result of the Committee's recommendation. This system called for more open prisons and an emphasis on reformation, character building, and correction rather than punishment.

Before I go any further in my narrative I should express my gratitude and appreciation to several learned authors whose works have been most informative to me in this area. Professor Jackson's report contains a summary of the history of habitual criminal legislation. In addition, another good reference is a book authored by Norval Morris entitled "The Habitual Criminal",[5] the introductory chapter of which is reproduced in Volume 13 of the McGill Law Journal at page 534. I have also found an article in the U.B.C. Law Review authored by Mr. John A. MacDonald[6] to be most informative.

Mr. MacDonald in his article makes the following observations with respect to the report of the Gladstone Committee:

> However, the Gladstone Committee was not prepared to admit the capacity for reformation of a 'large class of habitual criminals - who live by robbery and thieving and petty larceny - who run the risk of comparatively short sentences with comparative indifference.' To punish such offenders for their specific offences was almost useless because the real offence was their 'wilfull persistence in the deliberately acquired habit of crime.' It was therefore recommended that a new form of sentence be instituted which would segregate such offenders for long periods of time not under conditions of first-class hard labour, but at work under 'less onerous conditions'. The result it was suggested would be to deter many persistent offenders from further criminal behaviour while protecting the community through segregating proven habitual criminals for lengthy periods.

In the Prevention of Crime Act, 1908, which as I have stated flowed from the report of the Gladstone Committee, provision was made for the preventive detention of habitual criminals. That same Act, however, also provided for a system of borstal training for young offenders. It is significant that the theory of the provisions in this Act, both with respect to the young offender and the habitual offender, was that both these classes of offenders would be treated less harshly than other offenders, but for different reasons. The young offender was to be treated less harshly since there was hope for his reformation and correction. The habitual criminal was to be treated less harshly since he was not specifically being detained for criminal offences he had committed, but rather to prevent him from criminal offences which he was likely to commit.

Section 10 of the Prevention of Crime Act, 1908 provided, in part:

> 10.(1) When a person is convicted of an indictment of a crime - and subsequently - admits that he is or is found by the jury to be an habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reasons of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on determination of the sentence of penal servitude he be detained for such furtner pericd not exceeding 10 nor less than 5 years, as the court may determine (known as) preventive detention...
>
> (2) A person shall not be found to be an habitual criminal unless the jury finds on evidence...
>
> (a) that since attaining the age of 16 years he has at least 3 times previously to the conviction of the crime charged - been convicted of a crime - and that he is leading persistently a dishonest or criminal life; or
>
> (b) that he has on such previous conviction been found to be an habitual criminal and sentenced to preventive detention.

Professor Radzinowicz of the Cambridge Institute of Criminology has provided this description of the original purposes of the English legislation:

> During the debates [preceding the Prevention of Crime Act of 1908] Lord Gladstone reiterated that it had been devised as a weapon against the dangerous, hardened offender, not against those who were 'a nuisance rather than a danger to society'. But only three years later Winston Chruchill had to hammer home this lesson in a memorandum and letter to the police. The aim was to gain control over the professional, the offender who had given himself up to a life of crime... His dangerousness would be confirmed by such factors as the use of violence in conjunction with his other offences, the possession of firearms or other lethal weapons, and the sophistication of his tools or techniques...
>
> Still more serious, it became clear that Churchill's warnings had been forgotten, that the sentence was being imposed largely upon the wrong offenders. The majority were merely offenders against property, property often worth less than one hundred pounds. Only a tenth of them had committed violence against the person, sexual crimes or robbery... It was again the nuisances rather than the dangerous... who were the chief recipients of preventive detention under the 1948 Act [The Criminal Justice Act, 1948 which was the successor legislation to the Prevention of Crime Act of 1908].
>
> [Preventive detention] has given rise to much sense of unfairness and has shown no compensating advantages in reformation... The value of the sentence as a general deterrent has appeared to be slight, especially as it has been used in so few cases. And because it has been of comparatively little use, and for minor rather than for dangerous criminals, it has failed to fulfill its purpose as an additional means of protecting the public.7

The debates on the English Prevention of Crime Act, 1908 were interesting. The original bill proposing the Act made provision for an indeterminate term of preventive detention. This was modified after debate, however, to limit the term to one of from 5 to 10 years to be served following the term awarded for the substantive offence. The concept of the preventive detention being linked to a conviction for a substantive offence is referred to as the "dual track system". This theory of sentencing was also criticized by members of Parliament during the debates on the basis that it inflicted double punishment on the prisoners, but the dual track system formed the basis for the English habitual criminal legislation enacted by the Act of 1908.

England was not the only jurisdiction to enact habitual criminal legislation. Norval Morris, in the introductory chapter of his book makes reference to some of the common factors of this type of legislation:

> Persistent Offender, Professional Criminal, Incorrigible Offender, Dangerous Recidivist (Finnish law of 1932), Hardened Offender, Relegable, Habitual Criminal, and many similar terms are used to define certain groups of recidivists against whom various countries are prepared to take special measures to protect themselves, - measures usually involving their protracted segregation from society.
>
> Those countries which make use of this conception of the habitual criminal, define its scope in relation to some or all of the following factors:-
>
> 1. Number of crimes committed by an offender (sometimes over a certain period or since a certain age).
>
> 2. Type(s) of crimes committed by an offender (sometimes over a certain period or since a certain age).
>
> 3. Seriousness of offender's last crime(s) (and sometimes period since commission of previous crime).
>
> 4. Number and type(s) of punishments he has undergone (sometimes over a certain period or since a certain age).

5. Extent of danger to public presented by such type(s) of crime.
6. Extent of danger to public presented by such an offender.
7. Age of the offender.
8. Mental condition of the offender.
9. Biological and social background of the offender.
10. Susceptibility of the offender to reformation.8

Mr. Morris' chapter is republished in the McGill Law Journal as an introduction to a comparative study of habitual criminal legislation in the following jurisditions: Maine, Georgia, Missouri, Washington, California, Texas, France, Germany, Australia, India and the U.S.S.R.; which comparative study commences at page 654 of Volume 13 of the McGill Law Journal.

Habitual Criminal Legislation in Canada flows from a report of a Royal Commission of Inquiry chaired by Mr. Justice Archambault following a series of prison disturbances in the mid 1930's. This report, which was published in 1938, called for numerous reforms of prison administration and programs.[9]

The Archambault Commission had been preceded by a study by a departmental committee appointed by the English Home Secretary which recommended sweeping changes to the English system of preventive detention. The English Committee's recommendations led to the repeal in England of the habitual criminal provisions in 1948.

Notwithstanding their knowledge of the recommendations of the English departmental committee, the Archambault Commission recommended preventive detention for those habitual criminals who were defined as:

> a residue of the criminal class which is of incurable criminal tendencies...for whom 'iron bars' and 'prison walls' have no terrors, and in whom no hope or desire for reformation, if it ever existed, remains. 10

The Archambault Commission recommended habitual criminal legislation similar to that in force in England, with the following differences:

> The Commissioner's recommendations differed from the provisions of the Prevention of Crime Act, 1908, in the following respects:
>
> (1) It was recommended that habitual criminals be sentenced to terms of imprisonment for an indeterminate period.
>
> (2) A 'single track' system of sentencing was recommended, but the indeterminate term to be in lieu of any sentence for the substantive offence.
>
> (3) It was recommended that habitual criminals sentenced to preventive detention be completely segregated from other prisoners in a special institution to be located on an island down stream from the City of Quebec. 11

Parliament's attention was preoccupied by the war and the legislative enactment of these recommendations of the Archambault Commission was delayed until 1947, at which time the habitual criminal legislation I have referred to earlier in this report was introduced to amend the provisions of the Criminal Code here in Canada.

There were important differences, however between the Canadian and the English legislation. The English legislation provided for an indeterminate sentence with an upper and lower limit set by legislation. The Canadian legislation, however, provided no limitation on the length of the sentence that the habitual criminal was required to serve. It was therefore not indeterminate within prescribed limits but was absolutely indeterminate with the National Parole Board having absolute power and discretion over the habitual criminal as to the amount of time he would serve in prison. The legislation was introduced into the House of Commons in July of 1947 and stirred considerable debate. The government referred to the recommendations of the Archambault commissioners in support of the proposals to introduce habitual criminal legislation. However, the prison reforms proposed by the Archambault commissioners had not been implemented in the 9 years since the Archambault Commission's report was published. One member criticized the bill as follows:

> Would it not be better, when adopting a new system of this kind, which may be upset by the courts later on, to wait until we see what the result will be of proposals for prison reform?...I say those who are habitual offenders are the victims of a vicious, half-baked system...how can we expect anyone placed in institutions like those not to be an habitual offender...the system will fail because it is not founded on real prison reform. 12

Members of Parliament accurately predicted that the new legislation would not be uniformly administered since prosecution of offenders would differ from province to province depending upon the individual approaches of the respective attorneys general. Mr. Diefenbaker addressed both of these criticisms. He said:

> So far as Part X(a) is concerned, which covers habitual criminals, I believe the minister has gone too fast in introducing this provision before bringing into effect a system of rehabilitation as recommended by the Archambault Commission. I agree with the honourable member for Broadview that what we are doing here is bringing in punitive legislation against the habitual offender, without having given him an opportunity of rehabilitation after discharge from a penal institution. 13

And:

> If being an habitual criminal is to be the subject of punishment, why should there be a provision enabling the attorney general of one province to determine that proceedings shall be taken under this section and the attorney general of another province to determine otherwise under like circumstances? Criminal law...should be uniformly enforced in all parts of the Dominion without regard to the wishes of the individual attorney general. 14

Another member, Mr. McIvor, was concerned that the legislation was unduly severe and inhumane. He stated:

> Mr. McIvor: I do not know a great deal about law, but I must confess I am afraid of this amendment. It seems to indicate that, no matter what influence is brought to bear upon a man's life, he is not capable of change. I should like to think that no one is so depraved that he cannot be changed for the better. 15

The Minister of Justice, the Honourable J.L. Ilsley responded to the specific issued raised by Mr. McIvor as follows:

> The Minister of Justice: What is contemplated under this section is that habitual criminals will be placed under preventive detention, on an indeterminate sentence, but that their conduct will be reviewed by the Minister of Justice. The Minister must keep in touch

> with that man's conduct, and provision is made therefore in the section...the sentence is not a life sentence, necessarily. It contemplates release, if the man reforms. 16

In general response to the criticisms expressed by members of Parliament, the Minister of Justice suggested that too much attention was being paid to the habitual criminals concern. He stated:

> The important thing, after all, is the protection of society, and I cannot work up very great feelings of righteous indignation in favour of the suggestion that we are unjust in this law to men who have been guilty of serious crimes three times...and who have committed a fourth crime and have been found by a judge and jury to be leading persistently criminal lives. 17

At the conclusion of the debate the amendments to the Criminal Code were carried without modification and new law came into force on January 1, 1948. It is ironic, that there was no reference made to the wide-spread criticisms of the English statute upon which the Canadian legislation was based or the fact that at that very moment the English Government was in the process of repealing that legislation. The provisions of the English 1908 Act were superceded by s.21 of the Criminal Justice Act, 1948[18] which, in cases of persistent offenders, enabled corrective training or preventive detention to be imposed in lieu of any other sentence. Preventive detention was finally abolished in England under the Criminal Justice Act, 1967,[19] and s.37 of that Act introduced extended sentences as a means of dealing with recidivists.

The next critical review of the habitual criminal legislation in Canada occurred some 20 years after its introduction in Canada when the Canadian Committee on Corrections, which had been appointed in 1965 under the Chairmanship of Mr. Justice Ouimet examined the application of the habitual criminal legislation in Canada as part of its general study of corrections. Between 1947 and 1965 there had been amendments to the habitual criminal provisions in the 1953-54 and the 1960-61 sessions of Parliament.

The 1954 amendments to the Criminal Code introduced important procedural changes to the sections dealing with habitual criminals. Habitual criminal applications were to be heard by a court without a jury; preventive detention was defined to mean: "detention in a penitentiary for an indeterminate period" rather than confinement in "a prison or part of a prison set apart for that purpose" and the Code was amended to insure that the three convictions which were conditions precedent to an application for habitual criminal status must be on "separate and independent occasions".[20]

It is interesting to note that the theoretical concept of an habitual criminal being subject to less onerous incarceration than other prisoners, and the suggestion that habitual criminals be confined on some island (whether mythical or not) in the St. Lawrence River near Quebec were abandoned. There was no longer any pretense that habitual criminals were to be provided with more appropriate facilities to encourage their rehabilitation. The legislation now acknowledged the reality that habitual criminals were to be confined in penitentiaries like any other convict.

At the passage of the Parole Act in 1958 the National Parole Board took over the review functions which up to that period of time had been exercised by the Minister of Justice.

The session of Parliament introduced numerous reforms to the Criminal Code and during that session the Government brought in a number of important amendments to the habitual criminal provisions. The most important of these can be summarized as follows:[21]

(1) The dual track system of sentencing was abolished and henceforth terms of preventive detention were to be served in lieu of any sentence passed with substantive offence. 22

(2) The Minister of Justice was required to review the status of preventive detainees annually instead of once every 3 years. 23

(3) Length of notice to an offender of application to have him declared an habitual criminal was extended from one to seven clear days prior to passing the sentence for the substantive offence, to one of seven clear days but with a period of three months from passing of sentence for the substantive offence. 24

This, then, is the legislative history of the habitual criminal provisions up until 1968 when the Ouimet Committee made its report. As of August 30, 1968, the date upon which the Ouimet Committee did its study of habitual criminals, a total of 137 individuals have been sentenced to preventive detention as habitual criminals. The Ouimet Committee reviewed the criminal records of the 80 persons who on that date were still confined in Canadian penitentiaries with a view to ascertaining the class of persons to whom the legislation had been applied.

In conducting this study the Commission considered whether the offences committed by the habitual criminals were "offences against the person" or "offences not against the person". The Commission also further subdivided the offences against the person into categories of "serious" and "minor".

The result of this study was a conclusion that almost 40% of those sentenced to preventive detention did not appear to have represented a threat to the personal safety of the public, but a third of the persons confined as habitual offenders appeared to have constituted a serious threat to the personal safety of members of the public and that with respect to the balance of those studied there was not enough evidence to justify the conclusion that they represented a serious threat to personal safety to members of the public. The Committee concluded:

> The Committee concludes that, while the present habitual offender legislation has been applied to protect the public from some dangerous offenders, it is also been applied to a substantial number of persistent offenders who may, perhaps, constitute a grave social nuisance but do not constitute a serious threat to personal safety. 25

While any ongoing examination of the statistics relating to habitual criminals would have disclosed that there was an uneven application of the habitual criminal legislation, the Ouimet Committee focused specifically on this aspect. Tables published by the Commission illustrated graphically the unequal geographical application of the habitual criminal legislation in that of the 80 persons sentenced to preventive detention, 45 had been sentenced in British Columbia and 39 had been sentenced in the City of Vancouver. The Committee concluded:

> Legislation which is susceptible of such uneven application has no place in a rational system of corrections. 26

Nor could the Committee determine any rational policy basis upon which the habitual criminal legislation had been applied. It concluded:

> We have not been able to discover any consistent or rational basis upon which it has been invoked. Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice among the few offenders against whom it has been invoked...In the view of the Committee, the deterrent effect of the habitual offender legislation is necessarily slight owing to its infrequent application. 27

The Ouimet Committee recommended that the habitual criminal legislation be repealed and be replaced by new dangerous offender legislation, which legislation would also incorporate the provisions relating to dangerous sexual offenders. This recommendation was implemented with the enactment of the new Part XXI of the Criminal Code by the Criminal Law Amendment Act of 1977.

I cannot leave this examination of the history of the habitual criminal provisions without adding that my own observations after conducting an in depth study of the surviving habitual criminals is in agreement with the observations made by the Ouimet Committee. The number of individuals for whom I am recommending complete relief from continued preventive detention clearly illustrates the proposition that the majority of those individuals who were declared to be habitual criminals were nuisances to society rather than a danger to society. I do not propose to deal in detail with the numerous judicial decisions which consider the habitual criminal legislation during its existence. I will, however, make reference to a number of key decisions.

The Court of Appeal in England in R. v Hunter [1921] 1 K.B. 55 held that an allegation that an accused is an habitual criminal is not a charge of a criminal offence but rather an allegation of fact, status or condition which enables the Court to impose a special form of sanction. There was considerable judicial discussion of these issues in Canada, because of attempts by habitual criminals to seek appellant review.[28]

The constitutional validity of the habitual criminal legislation was considered in a number of cases prior to the introduction of the Charter of Rights. In R. v Buckler [1970] 2 C.C.C. 4 (Ont.) it was held that the punishment of preventive detention falls outside the ambit of "cruel and unusual treatment or punishment" prohibited by s.2(b) of the Canadian Bill of Rights, but that that provision might however serve as a guide to the trial Judge in the exercise of his discretion under s.660 in determining whether preventive detention was "expedient for the protection of the public". A similar finding was made with respect to the preventive detention of dangerous sexual offenders in R. v Roestad [1972] 19 C.R.N.S. 190, 5 C.C.C. (2d) 564.[29]

The Supreme Court of Canada affirmed a decision of the Quebec Court of Appeal holding that the preventive detention provisions were part of the sentencing procedure and hence within the criminal law power of the federal parliament in Ex Parte Matticks (1972) 10 C.C.C. (2d) 438 (Quebec C.A.); affirmed (1974), 15 C.C.C. (2d) 213 (S.C.C.).

Although I am surprised that there was ever any doubt about this issue, the Supreme Court of Canada in 1957 made it clear that the onus was on the Crown to prove beyond a reasonable doubt the ingredients necessary to a finding that an accused was an "habitual criminal".[30] The decision of the British Columbia Court of Appeal in Regina v Channing [1966] 1 C.C.C. 97 enunciated four tests which had guided the courts in reaching a decision on whether an accused was leading persistently a criminal life. After observing that the tests were not exclusive Mr. Justice Shephard summarized them as follows:

> (1) whether the substantive offence was premeditated or executed without planning;
>
> (2) whether the accused had done anything unlawful or dishonest during the period between his last release from custody and commission of the substantive offence;
>
> (3) whether the substantive offence was of the same general pattern as the accused's previous offences;
>
> (4) whether the accused had been habitually associating with criminals.

The application of the sentence of preventive detention and the distinction between individuals who were "a nuisance" rather than "a menace" was debated in such cases as Poole v R. (1968) 3 C.R.N.S. 213 (S.C.C.) and Mendick v R. (1969) 69 W.W.R. 17 (S.C.C.). These cases led to the decision in R. v Hatchwell. In the Hatchwell case the majority of the British Columbia Court of Appeal, at [1974] 1 W.W.R. 307 affirmed an order for preventive detention imposed by a Provincial Court Judge on Hatchwell who was described as "a personable thief, with periods of gainfull work", who reverted constantly to crimes against property and constituted "a grave menace to the public". The Supreme Court of Canada, however, held that Hatchwell was not a menace but rather a "nuisance" who should not be subject to preventive detention and reversed the decision of the British Columbia Court of Appeal at [1975] 4 W.W.R. 68, 21 C.C.C. (2d) 201.

I cannot leave this historical analysis of the habitual criminal legislation without making some observations as to whether or not the legislation achieved its objectives. I would agree with the observations of Allan W. Mewett in his article "Habitual Criminal Legislation under the Criminal Code":[31]

> Perpetual incarceration, besides being expensive, is a savage sentence to pass upon anyone for no other reason than the protection of other people, though it may, in some extreme cases be justified. Obviously the better, that is, less expensive and more humane, method of achieving this object is by some form of treatment. Once again, it is regrettable but true that the fewer habitual criminals there are, the less likely it is that anyone will go to the trouble and expense of attempting any treatment. Lord Goddard, during the debate in the House of Lords on the preventive detention section of the English Criminal Justice Bill of 1948, remarked:
>
>> 'I hope that before this Bill becomes law, if it does become law, we in the courts will have that which I think we are entitled to have - namely, full information as to what these novel methods of training are.'

In Canada the Archambault Report envisaged training and treatment facilities for habitual criminals. Up until the 1961 amendments to the Criminal Code s.665(2) provided for special facilities for habitual criminals and their treatment. Such facilities and special treatment programs have never existed, however, and preventive attention is served in the ordinary penitentiaries with no special facilities for those under preventive detention in the way of either work or treatment.

I must say that my review of the surviving habitual criminals have disclosed some whose criminal careers were arrested by the declaration of habitual criminal status and the sentence of preventive detention. On the balance, however, I am not convinced that the offences which have been committed by those habitual criminals who were released on parole established that they were a sufficiently serious threat to society to justify the oppressiveness of the indeterminate sentence and the incredible cost to the taxpayers of recycling many men who were mere nuisances. In fact there are persuasive arguments made that the indeterminate sentence is counter productive. Radzinowicz states that:

> The indeterminate factor in their release has given rise to much sense of unfairness and has shown no compensating advantages in reformation. 32

In a similar vein Mewett notes that:

> Any hope of reform may well be defeated if the prisoner is confronted with the fact that he is never to be a completely free person again. The depressing realization that he will either live and die in prison, or that he will live with the threat of prison hanging over him if he violates his parole, without necessarily committing any further criminal offence, must militate against genuine reform. 33

These observations by learned authors are in accord with the often poignant testimony of those habitual criminals, several of them elderly, who have testified before this Inquiry of the effect of the many years of incarceration or trips through the revolving the door that they have endured.

FOOTNOTES - CHAPTER 2

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1 Report of the Committee on Prisons (London H.M.S.O., 1895)

2 Probation of Offenders Act, 1907 7 Edward 7, c.17.

3 Children Act, 1908, 8 Edward 7, c.67.

4 Prevention of Crime Act, 1908, 8 Edward 7, c.59.

5 "The Habitual Criminal" Toronto, Longmans and Green, 1951.

6 For U.B.C. Law Review 87.

7 Radzinowicz, L., The Dangerous Offender, 41 The Police J. 411 (1968).

8 13 McGill Law Journal at pp.537 and 536.

9 Report of the Royal Commission to Investigate the Penal System of Canada (Ottawa, 1938).

10 The Report of the Royal Commission to Investigate the Penal System of Canada (Ottawa, 1938) at p.218.

11 As summarized in "A Critique of Habitual Criminal Legislation in Canada and England", John A. MacDonald, 4 U.B.C. Law Review 87 at p.90.

12. H.C. Deb (Can) 1947, Vol.VI, pp.5056-57.

13 Ibid., p.5057.

14 Ibid., at pp.5057-58.

15 Ibid., at p.5056.

16 Ibid., at p.5056.

17 Ibid., at p.5061.

18 Criminal Justice Act, 1948, 11 and 12 GO6, s.21.

19 Criminal Justice Act 1967, Chapter 58, Schedule 7, s.21.

20 S.C. 1953-54, C.51.; ss.662(2), 659(a), 659(c), and 660(2)(a).

21 A Critique of Habitual Criminal Legislation in Canada and England, John A. MacDonald, 4 U.B.C. Law Review 87 at pp.94-95.

22 S.C. 1960-61, c.43, s.33 (1) (amending s.660(1)).

23 Ibid., s.39 (amending s.666).

24 Ibid., s.35(1) (amending s.662(1)).

25 Report of the Canadian Committee on Corrections (1969) at p.252.

26 Ibid., at p.253.

27 Ibid., at p.247.

28 See Kirkland v R. [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1; R. v MacKenzie (1960) 33 C.R. 361, 128 C.C.C. 92 (Sask.C.A.); Rusch v R. [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340; R. v Robinson (1952) 14 C.R. 258, 102 C.C.C. 232 (B.C.C.A.) and [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.

29 Leave to appeal which decision was refused (1972) 19 S.R.N.S. 190 at 235 n (Ont.C.A.).

30 Kirkland v The Queen [1957] S.C.R. 3.

31 "Habitual Criminal Legislation under the Criminal Code" 39 Canadian Bar Review 43 at p.54.

32 Leon Radzinowicz, "That Dangerous Offender" The Police, 41 (1968) p.442.

33 Allan W. Mewett, "Habitual Criminal Legislation Under the Criminal Code" 39 Can. Bar Review (1961) pp.55-56.

CHAPTER 3

PREDICTING DANGEROUSNESS

The first of the terms of reference constituting this inquiry require me to:

> (a) inquire into and review the cases of each of the 93 persons still having the status of habitual criminal under the terms of legislation repealed by parliament in 1977, with a view to determining which habitual criminals no longer present a danger to the personal safety of others having regard for the criteria and philosophy set out in Part XXI of the Code;

With many of the habitual criminals reviewed my task has not been difficult, since many of these individuals have never presented a danger to the personal safety of others under the tests set forth in Part XXI of the Criminal Code or any other test of dangerousness. For others, however, close and careful scrutiny was required in order that I may attempt that most difficult task - predicting dangerousness.

The first stage of my inquiry involved a review of the criminal record and past behavior of each individual habitual criminal to determine if he had been convicted of a serious personal injury offence as defined in s.687 of the Criminal Code, namely:

> (a) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
>
> (i) the use or attempted use of violence against another person, or

> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person.
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (b) an offence or attempt to commit an offence mentioned in section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault). 1967-77, c.53, s.14; 1980-81-82, c.125, s.26.

Each of the habitual criminals reviewed was sent a notice by the Inquiry which included as schedules the following:

(a) as Schedule I, the complete criminal record;

(b) as Schedule II, those convictions which may constitute a serious personal injury offence as defined in s.687; and

(c) as Schedule III, further offences which may have been of an assaultative or potentially dangerous nature, but which were not serious personal injury offences as defined by s.687.

As I have already stated there were many habitual criminals who had never been convicted of a serious personal injury offence as defined by s.687. A good number of these individuals had never been convicted of a "Schedule III" offence, that is an offence which did not meet the criteria of being a serious personal injury offence but may have been an assaultative or potentially dangerous offence.

Where it was found by the Inquiry that the habitual criminal had committed a serious personal injury offence, it was my duty to further consider whether he came within the criteria set forth in s.688 of the Criminal Code with a view to determining whether he:

> (a) ...constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behavior by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 687 and the offender, by his conduct in any sexual matter including that involved in the commission of the

> offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,

In the Inquiry's hearings at Kingston, Ontario, I heard evidence from an acknowledged expert on the issue on deciding dangerousness, Dr. Christopher Webster of the Centre of Criminology at the University of Toronto. Dr. Webster is a psychologist with impressive credentials which were acknowledged by all involved in the Inquiry.

The Kingston hearings also involved Professor Ronald R. Price, Q.C., appearing as counsel representing several habitual criminals. Mr. Price is a professor in the Faculty of Law at Queens University and for many years was the head of the Correctional Law Center of that faculty.

Both of these gentlemen have written excellent works in the field of predicting dangerousness. I refer to Professor Price's article "Psychiatry, Criminal-Law Reform and the 'Mythophilic' Impulse: On Canadian Proposals for the Control of the Dangerous Offender" contained in (1970) 4 Ottawa Law Review at p.1. Dr. Webster, along with his colleague Bernard Dickens has recently completed a report entitled "Deciding Dangerousness: Policy Alternatives for Dangerous Offenders". This latter report was prepared through the Department of Justice, Canada through a grant to the Center of Criminology, University of Toronto.

I do not in this report intend to re-travel the areas dealt with by these two learned authors in their works. These papers should, however, be read by the reader of this report and considered in conjunction with this report. By this, I should not be taken to have adopted the opinions set forth in these works as my own. The topics encompassed by these works are complex and go beyond my terms of reference. They are, however, valuable resource documents for consideration of this most difficult area.

Professor Price's article which was written prior to the 1977 amendments to the Criminal Code and provides an introduction to the dilemma which legislators, judges, parole boards and I must face when predicting dangerouness - namely ensuring that the public is properly protected from the truly dangerous offender and yet providing sufficient safeguards to ensure that offenders are not falsely declared to be dangerous. There has been a great deal of recent scientific literature on the prediction of violence. The Webster-Dickens Report summarizes this literature in Chapter 2 (pp.13-19). The research summarized includes:

(a) the Baxstrom study by Steadman and Cocozza;[1]

(b) the Dickson study;[2]

(c) the Quinsey studies;[3]

(d) the Kozol study;[4]

(e) the Cocozza follow-up study;[5]

(f) the METFORS studies;[6]

(g) the Muller and Reinehr study;[7]

The Webster-Dickens Report also contains a thorough examination of the legal issues surrounding the dangerous offender provisions in Chapter 3 of the Report (pp.66-107). Included in this chapter are discussions on the admissability and weight of evidence as to future dangerousness with a specific emphasis on the role of the psychiatrist an expert witness in such proceedings. The chapter also deals with the burdens and standards of proof required in dangerous offender hearings and the likely impact of the Canadian Charter of Rights and Freedoms on such provisions.

The conclusions of the Webster-Dickens Report are summarized by its authors[8] and I feel that it is important to quote some of these conclusions:

> There is little evidence to suggest that psychiatrists or other mental health experts can predict the future dangerous conduct of patients or prisoners with any substantial degree of certainty. This statement holds true for predictions based on either clinical opinion or psychometric testing. Earlier findings which suggest that mental health workers overpredict violent behaviour have recently been confirmed, several times. Although these studies contain major methodological flaws, mostly unavoidable, the evidence taken as a whole does not inspire confidence in these partiuclar kinds of psychiatric and psychological judgments. It has been suggested that clinical judgments may be sound in the short run when the clinical assessor has a good knowledge of the individual's present and immediate future physical and social circumstances, but there is scant evidence even for this assertion. It appears that mental health workers do not demonstrably possess the ability to forecast the likelihood of violent conduct of persons over a span of several years. Special doubt about clinical predictive ability may apply when the prisoners under assessment do not apparently suffer from serious psychiatric disorders. An ad hoc interview study based on the opinions of some 40 Canadian forensic psychiatrists, forensic psychologists, and criminologists showed that these professionals themselves

would claim little ability to predict the future violent behaviour of Dangerous Offenders of the kind dealt with under Part XXI of the Criminal Code of Canada.

. . . .

Predicting violence at the level of the individual prisoner is practically impossible without an almost inconceivable degree of control over key environmental, treatment, and biomedical variables. It is imperative to recognize that the most any clinician or researcher can ever offer is a probability estimate of future violent behaviour. Some of the most promising recent research in the United States and Canada involves 'risk assessment'. This approach accepts as a basic premise that probabilistic statements are the most that can be expected and attempts, often with fair success, to demonstrate the predictive power of particular easily-obtained pieces of information. Such variables are age, number of previous convictions, amount of force used in the commission of the crime, etc. It is likely, particularly with a 'non-clinical' criminal population, that such predictions would be more, not less accurate than clinical predictions. Unfortunately, principles derived from this seemingly detached, 'rationalized', approach to decision-making are unlikely to appeal to the members of the public who mistakenly believe that a maximum degree of personal protection is achieved through the court-regulated application of the more or less intuitive judgments of mental health and criminological specialists.

. . . .

Beyond the already-noted difficulties presented by the recent literature on the prediction of future violent behavior, there are several legal issues which arise with respect to Part XXI proceedings. The potential exists for the imposition of a far more severe sentence under Part XXI provisions than would otherwise be possible under other sections of the Criminal Code. The major legal obstacle to the imposition of an indeterminate sentence is the reliance in a Part XXI proceeding upon

> the predictive 'evidence' of psychiatrists and other experts, whose expertise in such matters currently faces vigorous challenge.
>
> . . . .
>
> Indeed, an authorative voice for the scientific community with most relevance to the prediction of dangerousness, the psychiatric community, has suggested publicly and officially that *the present state of predictive competence is so primitive that it remains functionally unreliable and frequently inaccurate*. (my emphasis) In a 1976 case in the Supreme Court of the state of California (*Tarasoff*)[9] and in several subsequent cases, the American Psychiatric Association (APA) submitted *amicus curiae* briefs claiming that mental health professionals are not presently competent to make reliable and accurate clinical predictions of violence and that, consistently, such professionals tend to *over* predict dangerous behavior.
>
> The implications of such a disclaimer for the continuing role of expert witnesses in Dangerous Offender hearings would *appear* to be significant. The American experience, however, suggests otherwise. In a decision rendered in July, 1983, in a case involving the use of psychiatric testimony in the prediction of long-term dangerousness (*Barefoot*),[10] the United States Supreme Court rejected the advice of the APA brief, which had argued that psychiatrists should not be allowed to give evidence of an accused's future dangerousness in capital sentencing cases. To bar psychiatric predictions of this sort, the Court suggested in the majority opinion, 'would be somewhat like asking us to disinvent the wheel'.
>
> . . . .
>
> In the Canadian context, courts have tended to assess predictions of future behaviour on their individual merits and, in some cases, to let the problem of the unreliability of psychiatric predictions be construed as an issue of weight rather than admissibility of evidence. A recent Dangerous Offender proceeding in Ontario (*Morrison*) heard extended

evidence as to the unreliability and inaccuracy of psychiatric predictions of future dangerousness. Mossop, J.A., in what was clearly a most difficult judgment, found the defendant to be a Dangerous Offender within the meaning of Part XXI. While admitting the 'recognized perils of forecasting future conduct' he nonetheless thought that '[o]n this issue, the courts really have nowhere to turn except to those who have expertise in the field of psychiatry...'

. . . .

The inherent unreliability of psychiatrists' and other mental health professionals' predictions of long-term dangerousness in individual cases may be addressed through a number of options. One is to regard dangerousness in the same way the law regards insanity, that is, as a matter of fact determined by a jury according to legal instruction given by a judge and its own observation guided but not governed by psychiatric and other relevant evidence. This technique currently accounts for indeterminate detention of those not guilty by reason of insanity, and may be no less appropriate to commit to indeterminate detention those guilty by reason of dangerousness. This may not reduce psychiatric unreliability, but may mitigate it through the full conduct of adversarial scrutiny before a jury.

Judges acting alone may furnish an alternative option, by replacing parole boards in conducting hearings for the releases of Dangerous Offenders. Judges are expected to be no less sensitive that parole boards to the public's need for protection while having at the same time the individual's liberty rights at heart. As well, they can receive the opinions of experts within the correctional system while reserving the right to decide precisely the extent to which their decisions should rely on such information....

. . . .

The urge to protect the public against dangerous people is laudable. The question to be

> addressed is whether present knowledge allows this and to be achieved compatibly with just treatment of offenders. To tolerate their additional punishment on account of the crimes they are anticipated likely to commit is oppressive in obvious ways, unless the likelihood of offending is very compelling. Where it is, additional detention may spare injury to their likely victims, and spare them the consequences of further offending. Accepting less than perfect knowledge, a worthy task is to improve reliability and accuracy of prediction, improve consistency of treatment among comparable offenders, and maintain sensitive monitoring of the balance between reasonable (not complete) protection of the public, and the reasonable expectations of persons reliably considered dangerous eventually to be free.

The Report also describes "Fairly Obvious Difficulties" in predicting dangerousness:[11]

> 1. 'Dangerousness' as a concept is obscure and difficult to define; the very notion means different things to different people at different times.
>
> 2. Experimental analysis with random assignments to differentially treated groups is largely impracticable; valuable opportunities to follow 'natural experiments' occur infrequently.
>
> 3. Highly dangerous behaviors occur very seldom; it is difficult to predict such low base-rate phenomena.
>
> 4. The 'dangerous' populations which have been studied arise from more or less local attempts to assess and treat; this means that it is hard to compare one research sample with another.
>
> 5. Beyond a few attempts to define 'psychopath', and 'personality disorder', usually in gross and more or less common sense terms, no adequate psychiatric nosology exists to cover the kind of person who acts in a repetitively

and persistently aggressive fashion; as well there is little in the way of appropriate-to-task psychometric instruments.

6. Accurate and complete criterion measures of violent behavior at time of follow-up are hard to obtain for a variety of ethical and practical reasons; when it is possible to gather them it can prove difficult to integrate data derived from separate mental health and criminal justice systems.

7. There is a lack of correspondence between legal decision-making and clinical decision-making; the law frequently demands yes/no answers to problems which can only be properly dealt with in terms of probabilities.

8. Clinical opinions are, under ordinary circumstances, hard to evaluate because when they are accepted, as happens more frequently than not, they become untestable; if the individual is predicted dangerous he may be confined and thus the prediction itself cannot be checked.

9. Some clinical assessments are based on the very limited samples of behavior; a few clinicians seem unaware that, at all likelihood, a thorough face-to-face examination forms an essential aspect of the assessment problem.

10. Although some aspects of behaviour can be measured with great accuracy they may have little or no predictive validity; what is accurate may not be what is important.

11. The prisoner may respond during assessment in ways very different from his usual conduct; because it may pay him to behave in an out-of-ordinary fashion, the clinical assessment may be largely irrelevant.

12. It is a mistake to assume that a clinician ought to be able to offer an opinion that is equally valid across cases; presumably he or she is entitled to be justifiably more confident in some assessments that others.

In my assessment of the Habitual Criminals I have had the opportunity to consider the psychological and psychiatric reports there contained in the files and in some cases a psychiatric and psychological testimony has been heard by me. I have also had before me extensive reports with respect to the behavior of each of these habitual criminals while confined in custody and while on parole and have heard testimony from parole officers, living unit officers, and other who have had day-to-day contact with these individuals.

Dr. Webster, in his testimony before me in Kingston, testified that the insights of these "non-clinical" persons are often as valuable as psychiatric and psychological evaluations in predicting dangerousness since these individuals see the habitual criminal on an on-going basis in many types of situations and during many moods.

I feel I must comment on some of the dangers I have observed in the use of psychiatric and psychological reports in the review of these cases. The existence of an adverse psychological or psychiatric report almost invariably results in a negative decision by the National Parole Board when considering an habitual criminal's application for conditional release. Notwithstanding the academic concern about the reliability of expert predictions of dangerouness it is not surprising that those charged with the responsibility of determining whether or not an individual should go forth into society rely heavily on such input. This is not to say that adverse psychological and psychiatric input has not been overcome in some cases. To do so, however, has usually required the inmate to provide psychiatric and psychological evidence of his own which "neutralizes" the adverse concerns expressed.

This brings up a very serious and fundamental problem that I have discovered in my review of these cases. When the habitual criminal's case is being considered by the National Parole Board he is not as a matter of right made aware of the contents of psychological, psychiatric or medical reports which may be considered by the Parole Board in considering his case. It is not the policy of the Parole Board to make such materials available to the inmate, indeed the policy has been to treat such materials as confidential and not provide them to the inmate. This procedure causes me some considerable difficulty since the duty to act fairly to the inmate requires that he be made aware of all matters which the Parole Board may consider as being adverse to a favourable grant of conditional release, unless there is some valid public policy ground for keeping such information secret (such as the information provided by informants or information provided as a result of a continuing investigation into a crime etc.).

The procedure followed by this Inquiry was to provide each of the subjects of the Inquiry with full access to all relevant materials save and except such materials as can be said to fit within the public policy exclusions that I have mentioned. Having had, for the first time, adverse psychiatric and psychological reports made available, the habitual criminal was then in a position to provide evidence, either expert or lay, which would tend to refute the experts psychiatric or psychological evidence. In several cases, adverse psychiatric and psychological reports were successsfully refuted and indeed testimony was heard by this Inquiry from the authors of such reports who altered their position to one more favourable to the habitual criminal when further information was presented to them in the witness stand.

The scrutiny of these opinions during the Inquiry's hearings also disclosed that in some instances inappropriate psychological testing had been used and the results of such testing had been extrapolated to indicate potential dangerousness. When more appropriate psychological testing was done there was not such extrapolation of dangerousness.

The Inquiry also encountered instances where far more was read into psychiatric and psychological opinions than should be read into them. The examination of the experts shows the wording of the report was most misleading and without the further questioning of the author would have been unfairly prejudicial to the subject of the report.

Having expressed the difficulties involved in my task in assessing whether those habitual criminals I reviewed constitute a danger to society, I must acknowledge the difficulty of the task facing the members of the National Parole Board who make such assessments on a daily basis. While I have made some comments with respect to some aspects of the procedures involved in a parole hearing which I find to be unsatisfactory, I must say that my review of these files has shown that the National Parole Board has approached its duty in a responsible and thorough manner.

In my view, too much emphasis in the past has been placed on the capacity of psychiatrists and psychologists to predict future dangerous behaviour in both the Court system and the parole system.

My own approach to assessing these cases has been determined not only by the criteria set forth in Part XXI of the Criminal Code but also by common sense. I believe the best indicator of a person's potential for dangerousness is what he has done in the past. In this context considerable emphasis has been placed by the Inquiry in ascertaining the specifics of the past behavior of each of the habitual criminals with a view to ascertaining the potential danger which is evidenced by such conduct.

The experts also acknowledge the decrease in dangerousness and criminality as persons age or "burn-out". My examination of each of these individuals has focused considerably upon the attitudinal and behavioural changes that have occurred as they grew older. A third factor upon which I have placed emphasis in my consideration of these cases is to identify those external influences on behavior (drugs, alcohol, mental disorder) and attempt to discern the extent to which the habitual criminal has overcome his problems in these areas.

I should like to make this comment with respect to alcohol abuse. Many of the habitual criminals are alcoholics. This disease has been a significant factor in the "revolving-door syndrome" of these individuals. When released on parole a condition to abstain from alcohol is frequently included as a condition to such release. While some of the habitual criminals have been able to abide by this condition and successfully complete parole, many others have not. Those who have failed to abide by such conditions have found themselves, sooner or later, re-incarcerated as a result of the revocation of their parole.

If the purpose of conditions on parole for habitual criminals is to ensure behaviour in the community that will limit the danger to the public, then an abstinence clause is an appropriate condition if the habitual criminal has a history of committing dangerous or potentially dangerous acts while under the influence of alcohol. Many of the habitual criminals who were subject to such provisions did not, however, have any such history. Rather, their history would more often involve the commission of minor criminal offences (such as shoplifting) while under the influence of alcohol.

The difficulty in dealing with these individuals is that the parole framework under which their behavior was sought to be controlled is not appropriate for handling the chronic alcoholic. The Inquiry visited facilities in the City of Vancouver where chronic alcoholics are assisted. Many of the residents of this facility committed the same types of minor criminal infractions as was found to be committed by those habitual criminals who were chronic alcoholics. The result of such incidents, however, was vastly different since the habitual criminal could be returned to incarceration in a penitentiary for such offences.

The dilemma facing those officials in the corrections system trying to cope with an habitual criminal who is a chronic alcoholic is quite evident in a case reviewed by me in the Prairie Region. In this case an habitual criminal was released on a day parole to a community correctional centre. As a condition of his release he was required to "abstain from the consumption of all intoxicants". Soon after his grant of day parole it became clear that this individual, as a chronic alcoholic, was not complying with this condition. The officials of the community correctional center showed considerable patience and tolerance in attempting to handle the situation. Many separate incidents of drunkeness were logged over a period of several months. None of these incidents involved any violations of the criminal law or any potential danger to any persons or property. The incidents did, however, cause concern to the staff of the correctional center as a matter of principle since the example of tolerance of such conduct could set an inappropriate standard since others confined in the center may have exhibited dangerous behavior while under the influence of alcohol. The behaviour of the habitual criminal put the center staff in the impossible position of demanding a strict adherence to an abstinence clause from one prisoner while tolerating violations of such a clause from another.

It was only a matter of time before such a situation became intolerable and the habitual criminal was returned to custody in the penitentiary. This cycle recurred with this individual who served very long terms of imprisonment because of his failure to succeed on parole even though he committed no further criminal offences.

This type of individual may well have succeeded in existing crime free had he been released to facilities for the chronic alcoholic rather than facilities for the criminal. Unhappily, such facilities are not readily available in general and there are difficulties in arranging for the admission of habitual criminals to such facilities when they do exist.

My specific assessment as to the dangerousness of each of the habitual criminals is contained in the specific reports relating to those individuals. I have included this general chapter by way of a background to the approach I have taken in those assessments.

FOOTNOTES - CHAPTER 3

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1 Steadman and Cocozza, *Careers of the Criminally Insane: Excessive Control as Social Deviance* (Lexington Mass.: D.C. Heath, 1974). And see also Cocozza and Steadman "Some Refinements in the Measurement and Prediction of Dangerous Behaviour", 131 *Am. J. Psychiat.* 1012 (1974).

2 Thornberry and Jocoby, *The Criminally Insane: A Community Follow-Up of Mentally Ill Offenders* (Chicago: University of Chicago Press, 1979).

3 The Quinsey, Warneford, Pruesse and Link, "Released Oakridge Patients: A Follow-Up Study of Review Board Discharges", 15 *Brit. J. Crim.* 264 (1975). See also Quinsey, Pruesse and Fernley, "Oakridge Patients: Pre-Release Characteristics and Post-Release Adjustment", 3 *Psychiatry* & *Law* 63 (1975); Quinsey, Pruesse and Fernley, "A Follow-Up of Patients Found Unfit to Stand Trial or Not Guilty Because of Insanity", 20 *Canada Psychiat. Assoc.* J. 461 (1975); Pruesse and Quinsey, "The Dangerousness of Patients Released From Maximum Security: Replication" 3 J. *Psychiat. and Law* 293 (1977).

4 Kozol, Boucher and Garofalo, "The Diagnosis and Treatment of Dangerousness" 18 *Crime and Delinquency* 371 (1972).

5 Cocozza and Steadman, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence", 29 Rutgers L.R. 1084 (1976).

6 See Kigewski, METFORS *Working Paper In Forensic Psychiatry* No. 28 (1981) and Sepejak Menzies, Webster and Jensen "Medical Prediction of Dangerousness, 2-Year Follow-Up of 408 Pre-Trial Forensic Cases", 11 *Bull. Am. Acad. Psychiat. and Law* 177 (1983); See also, Menzies, Webster and Sepejak "The Dimensions of Dangerousness: Evaluating the Psychiatrict Predictions of Violence Among Forensic Patients", *Law and Human Behavior*, In Press; and Menzies, Webster and Sepejak "Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pre-Trial Clinic" in Webster, Ben-Aron and Huckler (eds.), In Press, Chapter 1.

7 Muller and Reinehr "Predicting Dangerousness of Maximum Security Forensic Mental Patients", 10 *J. Psychiat. and Law* 223 (1982).

8 See the Summary pp.xi to xvii.

9 *Tarasoff* v *Regents of the University of California* (1976) 551 B. 2d 334 in which the Defence to acclaim by the parents of the victim against University of California for a failure to warn was that there was no scientific basis to accurately predict dangerousness.

10 Barefoot (1980) 596 S.W. 2d 875 (*Text.* *Crim.* *App.*).

11 At pages 19 & 20 of the Report

CHAPTER 4

IS THE PARDON POWER AVAILABLE?

A. GENERAL

The terms of reference require that the Inquiry:

> Identify and recommend to the Minister of Justice and the Solicitor General of Canada, the most appropriate and expeditious mechanism for granting relief in the appropriate cases.

It is, therefore, the Inquiry's duty to examine the various possible mechanisms for granting relief from the continued preventive detention of those habitual criminals for whom the Inquiry recommends relief.

Prior to examining other possible release mechanisms I proposed briefly to examine the mechanisms which have, to date, been used to release habitual criminals from custody. Prior to the enactment of the Criminal Law Amendment Act, 1977 (1976-77, c.53, s.14) s.694 of the Criminal Code provided:

> REVIEW BY NATIONAL PAROLE BOARD
>
> 694. Where a person is in custody under a sentence of preventive detention, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act, and if so, on what conditions.

The old Part XXI was repealed with the enactment of the Criminal Law Amendment Act, 1977 and the old s.694 was replaced by s.695.1, which provides:

REVIEW FOR PAROLE - IDEM

> 695.1(1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, forthwith after the expiration of three years from the date on which that person was taken into custody and not later than every two years thereafter, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act and, if so, on what conditions.
>
> (2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before the Criminal Law Amendment Act, 1977 came into force, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act and, if so, on what conditions.

Section 15 of the Criminal Law Amendment Act, 1977 provided transitional provisions which stated:

> 15.(2) Section 693 and 695 of the Criminal Code, is enacted by Section 14 apply to a person who, before the coming into force of that section, was sentenced to preventive detention under Part XXI of the Criminal Code as if the references in those sections to 'a sentence of detention in a penitentiary for an indeterminate period' where references to 'a sentence of preventive detention'.

The result is that an habitual criminal is considered for parole pursuant to the provisions of s.10 of the Parole Act. That section also empowers the Parole Board to revoke the Parole of any paroled inmate. Section 10 provides:

> POWERS OF BOARD
>
> 10.(1) The Board may
>
> (a) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that
>
> (i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment,
>
> (ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and
>
> (iii) the release of the inmate on parole would not constitute an undue risk to society;
>
> . . . .
>
> (d) grant discharge from parole to any paroled inmate, except an inmate on day parole or a paroled inmate who was sentenced to death or to imprisionment for life as a minimum punishment; and
>
> (e) in its discretion, revoke the parole of any paroled inmate other than a paroled inmate to whom discharge from parole has been granted, or revoke the parole of any person who is in custody pursuant to a warrant issued under section 16 notwithstanding that his sentence has expired.

In assessing whether "the release of the inmate on parole would not constitute an undue risk to society" a Parole Board has treated the issue of risk to society as being the risk of committing a further offence. This approach makes no distinction in theory between an habitual who the Board regards as a risk of committing serious personal injury offences and an habitual who the Board regards as being a risk of committing other types of offences. Nor does this decision-making process distinguish between the risk of an habitual criminal who is a nuisance and one who is a menace to society as that distinction is made in the Supreme Court of Canada case in Hatchwell v The Queen.[1]

In addition, an habitual criminal may have his parole revoked at the discretion of the Parole Board if it is the Board's belief that his conduct on parole is in breach of any of the conditions of parole release or raises a suspicion that the parolee is at risk to re-offend, whether the offence which he may commit is a serious one or not.

Because of this approach by the Parole Board there has, in many instances, been a recycling of habitual criminals who at no time would ever be considered to be dangerous, but within the meaning of Part XXI of the Criminal Code or any other test of dangerousness, but who do constitute a risk of committing offences which are not dangerous to the personal safety of others. It is because of this recycling and the lengthy terms of imprisonment that have resulted from this process that the Inquiry was asked to perform its function.

In considering which mechanisms are the most appropriate and expeditious to provide relief to those habitual criminals who are entitled to that relief I must firstly come to the conclusion, as I have, that the parole system, under its present legislative framework, is not the appropriate mechanism for releasing into the public the non-dangerous habitual criminal. I will now proceed to examine other possible mechanisms for relief.

While legislative amendments could be adopted to resolve many of the problems that have arisen, the legislative process is a lengthy and time-consuming one. Legislation cannot be tailored to the many individual cases which we have considered. If there were no other alternative remedies available it would either be necessary to legislate provisions whereby those habitual criminals who pose no danger to society could have their sentence of preventive detention terminated; or proceedings by way of habeas corpus, as in the Mitchell[2] case, could be utilized by the habitual criminals to obtain release from custody if they are entitled to it under the principals set forth in the Mitchell case.

I am of the view, however, that there exists a flexible mechanism for providing relief to those habitual criminals who are deserving of such relief in the power to pardon and the balance of this chapter of the Report will consider this mechanism for relief.

In conducting hearings across Canada, the Inquiry has heard evidence of several habitual criminals who have sought the benefits of a pardon to remove their status of habitual criminal and the sentence of preventive detention. These individuals have been told at various times over the years that a pardon could not be utilized to provide any relief to them. In the Pacific and Atlantic regions Parole Board Officials have taken the position that the Parole Board may discharge an habitual criminal from parole, pursuant to the power given the Board in s.10(1)(d) of the Parole Act. In other regional divisions of the Parole Board habitual criminals were viewed as being ineligible for a grant of discharge from parole. In those regions an habitual criminal seems to have been regarded as the equivalent of a paroled inmate sentenced "to imprisonment for life with a minimum punishment" and therefore was considered as being ineligible for a grant of discharge.

There has been no policy of the National Parole Board which precluded the discharge from parole of habitual criminals. It would appear from the hearings of the Inquiry that had there not been the misunderstanding as to the availability of the parole discharge to habituals, several of the habituals who have performed well on parole for some considerable period of time would have had their cases reviewed for a grant of discharge from parole.

When a paroled inmate has been discharged from parole s.10(1)(e) of the Parole Act precludes the Parole Board from revoking his parole. An habitual criminal whose parole has been discharged would, therefore, be in the unusual position of being a person who still retains the status of "habitual criminal" and remains a sentence to preventive detention that is in a situation where there is no mechanism to reincarcerate the individual under that sentence since the Parole Board may not revoke a parole which it has discharged.

All of those habitual criminals who have been discharged from their parole are living lives as law-abiding citizens and so this legal conundrum has not given rise to any practical concern. Those habituals who have been discharged, however, have expressed their desire to the Inquiry to have the remaining blemish of the status of habitual criminal removed from their name. Several have requested pardons but were told that it was unavailable to them. I now propose to examine the issue of the availability of a pardon and the extent to which it may be used to provide the appropriate mechanism for relief for all of those habitual criminals who are deserving of relief being granted.

B. THE POWER TO PARDON

1. Statutory and Other Provisions Relating to Pardons

At the outset of this examination I propose to set forth those provisions which specifically relate to and govern the use of the pardon power. Section 683 to 686 of the Criminal Code provide:

> CRIMINAL CODE
>
> PARDON
>
> TO WHOM PARDON MAY BE GRANTED - Free or conditional pardon - Effect of free pardon - Punishments for subsequent offence not affected.
>
> 683.(1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of the Parliament of Canada, even if the person is imprisoned for failure to pay money to another person.
>
> (2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.
>
> (3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.
>
> (4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an

> offence other than that for which the pardon was granted.
>
> . . . .
>
> 685.(1) The Governor in Council may order the remission, in whole or in part, of a pecuniary penalty, fine or forfeiture imposed under an Act of the Parliament of Canada, whoever the person may be to whom it is payable or however it may be recoverable.
>
> (2) An order for remission under subsection (1) may include the remission of costs incurred in the proceedings, but no costs to which a private prosecutor is entitled shall be remitted.
>
> ROYAL PREROGATIVE
>
> 686. Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.

The Criminal Records Act[3] provides:

> APPLICATION FOR PARDON
>
> 3. A person who has been convicted of an offence under an Act of the Parliament of Canada or a regulation made thereunder may make application for a pardon in respect of that offence.
>
> PROCEDURE
>
> MAKING OF APPLICATION - Inquiries by Board - Calculation of period of sentence - Report by Board - Grant of pardon.
>
> 4.(1) An application for a pardon shall be made to the Minister, who shall refer it to the Board.
>
> (2) The Board shall cause proper inquiries to be made in order to ascertain the behavior of the applicant since the date of his conviction, but such inquiries shall not be made

(a) where the applicant was convicted of an offence punishable on summary conviction in proceedings under Part XXIV of the Criminal Code, until, in the case of the imposition on the applicant of

(i) a sentence of imprisonment,

(ii) a period of probation, or

(iii) a fine,

two years have elapsed since the termination of the sentence of imprisonment, the termination of the period of probation or the payment of the fine, as the case may be, or in the case of the imposition on the applicant of

(iv) a period of probation in addition to a sentence of imprisonment,

(v) a period of probation in addition to a fine, or

(vi) a fine in addition to a sentence of imprisonment,

two years have elapsed since the later of the termination of the sentence of imprisonment, the termination of the period of probation or the payment of the fine, as the case may be; or

(b) in any other case, until five years have elapsed since the date from which the two year period provided in paragraph (a) would have been computed, it that paragraph had been applicable to the applicant.

(3) For the purposes of this section, in calculating the period of any sentence of imprisonment imposed on an applicant there shall be included, in addition to any time spent by him in custody pursuant to that sentence, any period of statutory remission granted to him in respect thereof.

(4) Upon completion of its inquiries, the Board shall report the result thereof to the Minister with its recommendation as to whether a pardon should be granted but, if the Board proposes to recommend that a pardon should not be granted, it shall, before making such a recommendation, forthwith so notify the applicant and advise him that he is entitled to make any representations to the Board that he believes relevant; and the Board shall consider any oral or written representations made to it by or on behalf of the applicant within a reasonable time after any such notice is given and before making a report under this subsection.

(5) Upon receipt of a recommendation from the Board that a pardon should be granted, the Minister shall refer the recommendation to the Governor in Council who may grant the pardon which shall be in the form set out in the schedule.

EFFECT OF GRANT OF PARDON

EFFECT OF GRANT

5. The grant of a pardon

(a) is evidence of the fact that the Board, after making proper inquiries, was satisfied that an applicant was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and

(b) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.

REVOCATION

REVOCATION OF PARDON

7. A pardon may be revoked by the Governor in Council

(a) if the person to whom it is granted is subsequently convicted of a further offence under an Act of the Parliament of Canada or a regulation made thereunder; or

(b) upon evidence establishing to the satisfaction of the Governor in Council

(i) that the person to whom it was granted is no longer of good conduct, or

(ii) that such person knowingly made a false or deceptive statement in relation to his application for the pardon, or knowingly concealed some material particular in relation to such application.

SAVING PROVISION

9. Nothing in this Act in any manner limits or affects the provisions of the Criminal Code, or of the Letters Patent Constituting the Office of Governor General of Canada, relating to pardons, except that sections 6 and 8 apply in respect of any pardon granted either before or after the commencement of this Act pursuant to any authority conferred by those provisions.

2. The Letters Patent Constituting the Office of Governor General of Canada[4]

Paragraph II of the Letters Patent provide:

> And we do hereby authorize and empower Our Governor General, with the advice of our Privy Council for Canada or any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but no so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authority granted or appointed him by virtue of the British North America Act, 1867 to 1946 and the powers and authorities hereinafter conferred in these Letters Patent and in such Commisssion as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be enforced in Canada.

Paragraph XII of the Letters Patent provides:

> And We do further authorize and empower Our Governor General, as he shall see occasion, in Our Name and Our behalf, when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder, to grant a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further to grant to any offender convicted of any such crime, or offence in any Court, or before any Judge, Justice, or Magistrate, administering the laws of Canada, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to our Governor General may seem fit, and to remit any fines, penalties or forfeitures which may become due and payable to Us. And we do hereby direct and enjoin that our Governor General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of Our Privy Council for Canada and, in other cases, the advice of one, at least, of his Ministers.

Section 22 of the Parole Act provides:

> ADDITIONAL JURISDICTION
>
> CLEMENCY
>
> 22.(2) The Board shall, when so directed by the Solicitor General of Canada, make any investigation or inquiry desired by the Solicitor General in connection with any request made to the Solicitor General for the exercise of the royal prerogative of mercy.

The Interpretation Act[5] provides, in s.16:

> HER MAJESTY
>
> HER MAJESTY NOT BOUND OR AFFECTED UNLESS STATED
>
> 16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

From the foregoing, it can be seen that there are the following separate sources of the power to pardon, namely:

(a) the statutory provision contained in s.683 of the Criminal Code;

(b) the statutory provisions set forth in the Criminal Records Act;

(c) the power given the Governor General contained in paragraph XII of the Letters Patent;

(d) the general powers given to the Governor General contained in paragraph II of the Letters Patent; and

(e) any power traditionally resting in Her Majesty, pursuant to the royal prerogative of mercy, whether or not such powers have been vested in the Governor General in the Letters Patent.

In my view, there need be no further discussion of the pardon powers contained in the Criminal Records Act since the pardon envisaged by that Act can have no application to habitual criminals since it is a condition precedent to the consideration of an application for pardon pursuant to the Criminal Records Act that a number of years "have elapsed since the termination of the sentence of imprisonment, the termination of the period of probation or the payment of the fine, as the case may be". Since an habitual criminal's sentence of preventive detention never terminates, an habitual criminal can never be eligible to be considered for a pardon pursuant to the provisions of the Criminal Records Act.

Several of the habitual criminals who had requested a pardon because of their lengthy terms of good behaviour on parole were simply advised that they were ineligible for a consideration for a pardon because they did not come within the terms of the Criminal Records Act. In those instances, there was no consideration as to whether or not an habitual criminal would be eligible for consideration for a pardon pursuant to the other provisions I have referred which provide for pardons.

3. The Royal Prerogative of Mercy

The inter-relationship between the exercise of the various royal prerogatives and the development of Parliament over the centuries has set the foundation for the British Constitution upon which our constitutional form of government is based.[6] Sir William Blackstone, in his Commentaries on the Laws of England,[7] stated:

> that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the King's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject.

While the particular focus for this examination will be the prerogative of mercy, it should be noted that this prerogative is only one of the several prerogative powers that are, or have been, vested in the Crown. A full examination of the historic prerogatives of the Crown is contained in Joseph Chitty's "A Treatise on the Law of the Prerogatives of the Crown"[8]. The King exercised prerogative powers in relation to: foreign affairs; the National Church of England; the Houses of Parliament; the awarding of honours, privileges, and franchises; foreign commerce, taxation power, and others. Of particular interest in this context are the royal prerogatives relating to the administration of justice. The King was regarded as the fountain of justice and the administrator of all laws. Since[9]:

> As the fountain of justice, and administrator of the laws, all judicial power is supposed to be derived from the Crown; and though the King himself possesses none, yet he appoints those by whom it is exercised, and constitutes courts and offices. The pardoning offenders and issuing proclamations are also ranked among the prerogatives of the Crown.

Another prerogative of the Crown was the role of the King as parens patriae as to infants, the mentally ill, and charities. The Crown is regarded in legal contemplation as the guardian of the people, with a duty to take care of such subjects as are either legally unable, or on account of mental incapacity unable, to take proper care of themselves and their property.

It became unnecessary for the Crown to exercise many of its prerogative powers since those functions became the subject of statutes enacted by Parliament. It cannot be said, however, that royal prerogatives have been abrogated by statute unless a statute specifically states that it is abrogating or affecting a royal prerogative. Parliament itself has so enacted in s.16 of the Interpretation Act:

> HER MAJESTY NOT BOUND OR AFFECTED UNLESS STATED
>
> 16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

The limitations on the royal prerogative authority has been established over the centuries and the law of the prerogative as laid down by Sir Henry Finch under Charles I summarizes the right of the Crown to exercise its prerogative when it states[10]:

> The King hath a prerogative in all things, that are not injurious to the subject; for in them all that must be remembered, that the King's prerogative stretcheth not to the doing of any wrong.

Thus, much as the doctrine of equitable estoppel must be "used as a shield and not as a sword", as set forth the judgment of Denning, L.J. in Central London Property Trust

Ltd. v Hightrees House Ltd.[11] The royal prerogative must be used as a shield for the protection or benefit of the subject, rather than as a sword to do injury to the subject. This principle is reflected in the decision of the House of Lords in Attorney General v De Keyser's Royal Hotel,[12] where the purported exercise of expropriation-like powers would have committed an injury to the subject beyond that which was permitted by the relevant statutory enactments.

The functions of this enquiry are reflected in the words of the great medieval English jurist, Henry Brackton, who commented as follows on the exercise of the royal prerogative of mercy[13]:

> A King ought not only to be wise but merciful, his justice tempered with wisdom and mercy. Yet though there is greater safety in having to render a final account for mercy rather than judgment, it is safest that a judge's eyes precede his steps, that judgment not become uncertain through unconsidered discretion nor mercy debased by indiscriminate application, for mercy is indeed unjust when it is extended to the incorrigible.

It is therefore fitting and in accord with our legal traditions that the eyes of a Judge are cast upon those who were at one time thought to be incorrigible and declared to be habitual criminals, to determine whether they are worthy of the mercy of the Crown if they are no longer incorrigible and a danger to society.

A little less than 200 years ago, another great English jurist, Sir William Blackstone, commented on the royal prerogative of mercy[14]:

> ...the King's most gracious pardon; the granting of which is the most amiable prerogative of the Crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the King is his coronation oath, and it is that act of his government which is the most personal and most entirely his own.
>
> The King himself condemns no man; that rugged task he leaves to his courts of justice; the great operation of his scepter is mercy. His power of pardoning was said by our Saxon ancestors to be derived a lege suae dignitatis (from the law of his dignity): and it is declared in Parliament (1536) that no other person hath power to pardon or remit any treason of felonies whatsoever, but that the King hath the whole and sole power thereof, united in knit to the imperial crown of this realm.
>
> . . . .
>
> Pardons (according to some theorists) should be excluded in a perfect legislation, where punishments are mild but certain; for that the clemency of the Prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the Judge or jury, that of construing the criminal law by the spirit instead of the letter; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment.

Blackstone also set forth the extent and limits of the royal prerogative of mercy. The King may pardon all offences against the Crown or the public, excepting:

(a) the King cannot, through the royal prerogative of mercy, pardon where private justice and interests are principally concerned in the legal proceedings in that "the King cannot confer a favour by the injury and loss of others"; and

(b) the King cannot pardon a common nuisance which remains unredressed.[15]

Joseph Chitty, in his treatise on the law of the prerogatives of the Crown, set forth these principles as follows:[16]

> The King's right to pardon and remit the consequences of a violation of the law, is confined to cases in which the prosecution is carried on in His Majesty's name, for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture, to which His Majesty is entitled.
>
> . . . .
>
> So, where any legal right or benefit is vested in a subject, the King cannot affect it; and, consequently, where a statute gives a right of action to a party grieved, by the commission of an offence, though it be of a public description, His Majesty has no power, by law to prevent the party aggrieved from bringing his action, even by pardoning the offender before it is commenced, nor can His Majesty discharge a recognizance to keep the peace towards an individual before it is forfeited, private security being the object of the instrument.
>
> . . . .
>
> In short the general principle is clear, that the King cannot pardon in cases where no interest is, either in point of fact, or by implication of law, vested in him.
>
> . . . .
>
> The King's prerogative right to pardon violations of the law is not confined to offences punishable at common law by indictment. His

> Majesty may by a charter of pardon discharge not only a suit in the spiritual court _ex officio_; but also any suit in such court _ad instantiam partis pro reformatione morum_ or _salute animae_; as for defamation, or laying violent hands on a clerk, but the King cannot, by pardoning, discharge any suit in a spiritual (or other) court in which the Plaintiff seeks to recover any property; or in which any interest is vested in him: as in the case of a suit for tithes or legacies.
>
> . . . .
>
> There is another case in which offenders are entitled as a matter of legal right to a pardon; and that is where the King promises to pardon them, by special proclamation in the gazette or otherwise.

The writings of Sir Matthew Hale (Chief Baron of the Exchequer from 1660 to 1671 and Chief Justice of the King's Bench from 1671 to 1676) provides additional authority to the same effect in his writings on _The Prerogatives of the King_.[17] He states:

> Exemption from guilt and punishment comes properly enough under this title, _viz_ by pardon. The King, as appears before, is by the laws entrusted with the prosecution and punishment of public offences, so far forth as they are public, as for misdemeanors, nuisances, felonies, upon indictment, suits in star chamber, in the ecclesiastical courts _ob salutem animae_....These are pardonable by the King, for though he cannot dispense with the offences before committed, because he is not, nor can be, entrusted with such power, which would tend so far to the prejudice of the kingdom...the King cannot release a surety of the peace before it be broken, but after he may. So he may pardon those offences of the highest nature as against his own suit, though not against the suit of the party,...The King's pardon in such cases is so strong that it takes away the guilt _in foro humano_ as well as the punishment.

Thus, at common law, the royal prerogative of mercy extends to all punishments inflicted as a result of proceedings being commenced in His Majesty's name which were of a public nature. The royal prerogative was available to the Crown to provide relief from decisions of ecclesiastical courts, the star chamber and the like, and was never confined to the strictly criminal prosecution of offences. The sole principle limiting the exercise of the prerogative of mercy was that it could not be utilized to confer a favour on one man to the injury and damage of others.[18] Or, as Chitty states, the King "may pardon offenders, but cannot prejudice civil rights and remedies."[19]

In exercising the royal prerogative of mercy, the Crown may restrict the operation of the pardon to specified offences and may impose conditions to the pardon. Blackstone stated:

> A pardon may also be conditional; that is the King may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country (usually to some of His Majesty's colonies and plantations in America) for life, or for a term of years; such transportation or banishment being allowable and warranted by the Habeas Corpus Act.

To the same effect, Chitty states:[20]

> By the common law, the King may annex to his bounty a condition either precedent or subsequent; on the due performance whereof the validity of the pardon will depend.
>
> . . . .

> The prerogative may also be partially exercised in pardoning an offender; so that the King may remit part of the sentence of the law.

There seemed to be a considerable debate amongst legal scholars in the past as to whether or not the King could utilize the royal prerogative of mercy by changing the mode of punishment by death by substituting a mild form of capital punishment for a more severe form of capital punishment (that is, could the King, through the royal prerogative of mercy, substitute a sentence of death by hanging or burning into a sentence of death by beheading [which was thought to be more merciful]). Having considered the opposing authorities, Chitty gives the following opinion:

> The better opinion seems to be, that the King is entitled to the prerogative in question; and that as he may pardon a criminal on certain conditions, there is no objection to the condition being the offender's submission to a less severe punishment. The punishment which the law has inflicted is certainly altered by this prerogative, but the power of pardoning or punishing is left by the British constitution very generally with the King.

As we have seen, the Letters Patent of the Governor General of Canada authorized the Governor General "to exercise all powers and authorities lawfully belonging to us in respect of Canada". This is in accordance with the tradition that the prerogative powers are usually delegated to colonial governors or to governors general of former colonies. By so delegating, however, the Sovereign does not entirely divest herself of the prerogative powers.[21] The Chief Justice of Canada set forth this principle in the Supreme Court of Canada decision in the case of the Attorney General for Canada v Attorney General for Ontario (1894) 23 S.C.R. 458 at p.468, where Chief Justice Sir Henry Strong states:[22]

> By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the Crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole or Her Majesty's dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the Crown. Such delegation, whatever may be the conventional usage established on grounds or political expediency, a matter which has nothing to do with the legal question, cannot however in any way exclude the power and authority of the Crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's dominions. I take it to be the invariable practice, in the case of colonial governors to delegate to them the authority to pardon in express terms, either by the commission under the Great Seal, or in the instructions communicated to them by the Crown. This being so, and this practice having prevailed as far as I can discover universally and for a long series of years, I should have thought that it at least implied that in the opinion of the law officers of the Crown, an authority on such points second only to that of a judicial decision, that the prerogative of pardoning offences was not incidental to the office of a colonial governor, and could only be executed by such an officer in the absence of legislative authority, under powers expressly conferred by the Crown....That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be well recognized constitutional canon.

It is, therefore, established beyond question that the authority in Her Majesty to exercise the royal prerogative of mercy remains and that the exercise of the prerogative of mercy in Canada is not restricted by the Letters Patent constituting the office of Governor General of Canada.

I have come to the conclusion that the pardon power, other than the power to pardon as set forth in the Criminal Records

Act, is available to provide a remedy in the cases of the habitual criminals I have reviewed. I am of the view that the pardon power as provided for in s.683 of the Criminal Code may be resorted to to provide this relief and that, in addition, there is a power of pardon pursuant to the Letters Patent creating the office of the Governor General and the royal prerogative of mercy, which is also available to provide this type of relief.

There have, however, been arguments raised in the past that one or more of these provisions are not available to provide this relief. I now propose to set forth my views with respect to these arguments, with which I do not agree.

Dealing firstly with s.683 of the Criminal Code, the two relevant sub-sections are as follows:

> 683(1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of the Parliament of Canada, even if the person is imprisoned for failure to pay money to another person.
>
> (2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

With respect to s.683(1), there would appear to be little doubt on the plain wording of the subsection that it would authorize Her Majesty to extend the royal mercy to an habitual criminal. An habitual criminal is clearly "a person who is sentenced to imprisonment under the authority of an Act of the Parliament of Canada". It has been argued, however, that the operation of subsection 1 is confined to those situations where a "person is imprisoned for failure to pay money to another person". It is argued that the legislative history of the subsection somehow establishes that the subsection's application is so limited. The legislative history of the subsection is stated to be a United Kingdom statute enacted in 1859 - 22 Victoria c.32 which reads:

> Whereas penalties which under penal statutes are made payable to parties other than the Crown cannot be remitted or pardoned by the Crown where no express provision has been made by the statute for that purpose, and it is expedient that the law as to the remission of such penalty should be amended and made uniform: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lord Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, as follows; that is to say,
>
> It shall be lawful for Her Majesty (or in Ireland for the Lord Lieutenant or other Chief Governor or Governors of Ireland) to remit in whole or in part any sum of money which under any Act now in force or hereafter to be passed may be imposed as a penalty or forfeiture on a convicted offender, although such money may be in whole or in part payable to some party other than the Crown, and to extend the royal mercy to any person who may be imprisoned for non-payment of any sum of money so imposed, although the same may be in whole or in part payable to some party other than the Crown.

The substance of this English legislation was enacted by the Canadian Parliament as s.125 of An Act Respecting Procedures in Criminal Cases, and Other Matters Relating to Criminal Law, Statutes of Canada 1869, c.29, which reads:

> 125. The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person be imprisoned for non-payment of money to some party other than the Crown.

While I agree with the proposition that the legislation which preceded s.683 of the Criminal Code modified the powers that were available to the Crown at common law so that the prerogative could be applied, pursuant to the statute law, even where private interest was involved when such an appliation would not have been permitted at common law, I do not agree with the further proposition that this legislative history in any way results in any interpretation of s.683(1) which would limit its applicability to that type of situation.

Section 11 of the Interpretation Act provides:

> 11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The argument that subsection 683(1) is restricted to cases where a person is in prison for failure to pay money to another person acknowledges the remedial nature of part of the section, but does not comply with s.11 of the Interpretation Act and it does not give the entire section a fair, large and liberal construction and interpretation as best ensures the attainment of its objects. The remedial nature of the amendments were to remove one of the few restraints upon the common law exercise of the prerogative of mercy. The plain wording of the section clearly does that. I am of the view that the legislative history of the section does not support the interpretation argued for and that even if it did, resort to the legislative history cannot properly be permitted to overcome the clear language of the section.

I adopt the language of Hazen, C.J. in R v Bank of Montreal, (1919) 49 D.L.R. 288, who stated:

> ...I think there can be no doubt whatever as to what the intention of the legislature was, and that being so, I do not think we should search for canons of construction in order to define what the meaning of the statute is, as its meaning is absolutely clear without any canons of construction being applied.

Similar judicial statements are numerous. Riddell, J., stated:[23]

> Whatever those seeking the act intended or supposed, we cannot go behind the language of the statute - nor, where the language is plain and unambiguous, can we look to the supposed purpose of the legislation.

Mr. Justice Nesbitt of the Supreme Court of Canada in C.P.R. v James Bay Railway stated:[24]

> The general rule which is applicable to the construction of all other documents is equally applicable to statutes and the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words related to. He may call to his aid all those external or historical facts which are necessary for this purpose and which led to the enactment and for those he may consult contemporary or other authentic works and writings. This, however, does not justify a departure from the plain reasonable meaning of the language of the Act.

In the context of this discussion, it is the argument which would restrict the application of subsection 683(1) which goes contrary to the common law principle that "a pardon shall be taken most beneficially for the subject, and most strongly against the King".[25] The consequence of such an interpretation goes directly opposite to the whole spirit of our law and the plain reading of the statute. It is, therefore, clearly inappropriate that this statute be construed in any way other than its plain language.

I am therefore of the opinion that s.683(1) is declarative of the authority of Her Majesty to grant relief to those declared to be habitual criminals. I do not say that that section creates the power to grant such relief since, in my view, Her Majesty has that authority at common law as a result of the royal prerogative of mercy. I do say, without hesitation, however, that there is nothing in s.683(1) which abrogates Her Majesty's authority to grant such relief to habitual criminals.

I next turn my attention to s.683(2) of the Criminal Code which provides:

> 683.2 The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

While subsection 683(1) makes reference to Her Majesty's powers, subsection 683(2) authorizes the Governor in Council to act and grant a pardon. It has been argued that subsection 683(2) is not applicable to habitual criminals since, upon the reasoning set forth in Brusch v The Queen [1953] 1 S.C.R. 373; Parks v The Queen [1956] S.C.R. 134 and Kirkland v The Queen [1957] S.C.R. 3. The declaration that a person is an habitual criminal does not amount to that person being convicted of an offence or crime, but it's merely a declaration of status or condition.

The issue in the Brusch case was whether Brusch should have been given the right to elect his mode of trial on the proceedings that were brought against him to declare him an habitual criminal. Brusch argued that he should be entitled to elect his mode of trial and argued that the habitual criminal proceeding was a charge of an indictable offence. He further argued that since he had never elected to be tried by the County Court Judge who tried him, that the declaration that he was an habitual criminal was made without jurisdiction. This argument was rejected by Estey, J., who stated:

> With great respect to those who entertain a contrary opinion, Part XVIII restricts the right to an election to certain indictable offences. The addition of a charge of being an habitual criminal, after the required notice, does not become a part of the offence or crime charged in the indictment. There is, therefore, no right, within the meaning of the provisions of Part XVIII, to a further election upon the crime as charged, when a charge of being an habitual criminal is added to the indictment.

The Brusch case was followed by several others which established that, for various purposes of the Criminal Code, that is for the purpose of electing mode of trial, or appealing what would otherwise be a "conviction" an allegation that a person is an habitual criminal did not amount to a charge of an "offence", nor did a finding that a person is an habitual criminal amount to a "conviction".

The availability of subsection 683(2) to provide relief to habitual criminals is a bit of a moot point, since I have already decided that subsection 683(1) of the Criminal Code is available to provide that relief. It would appear, however, that on the authority of the Brusch case and those cases following that decision, that a person declared to be an habitual criminal cannot be said to be "a person who has been convicted of an offence" with respect to the habitual criminal proceedings.

Of course, however, an habitual criminal must, by definition, have been convicted of offences. Subection 683(2) is available to pardon those offences which are conditions precedent for the finding of habitual criminal status. If those offences are pardoned, arguably the habitual criminal status and sentence of preventive detention would, of consequence, cease to be effective. I do not believe that such a convoluted route is required in order to provide relief by way of the pardon power to habitual criminals, however.

It has been argued further that, given the Brusch decision, paragraph XII of the Letters Patent constituting the office of the Governor General of Canada would not provide authority for the granting of a pardon to habitual criminals since the power to grant a pardon is restricted to situations "when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder" and to situations where an offender is "convicted of any such crime or offence in any Court". I am not of the view that the judicial decisions defining the words "offence" or "conviction" for the purposes of the procedural provisions of the Criminal Code need be binding on the Governor General and interpreting the instructions given to him by Her Majesty in paragraph XII of the Letters Patent.

While there is a duty upon the Supreme Court of Canada and the Courts to interpret the technical procedural provisions of the Criminal Code to ascertain what specific procedures are available to a person charged with being an habitual criminal, it does not follow that these same definitions should bind a Governor General in the exercise of his authority under paragraph XII. The concept of habitual criminals and habitual criminal proceedings under the Criminal Code were unknown at the time the instructional paragraphs in the

Letters Patent were originally drafted. The intention is clear, however, and I am of the view that for the purposes of interpreting paragraph XII of the Letters Patent, the Governor General may offer a pardon, either free or subject to lawful conditions or a respite on the execution of the sentence of an habitual criminal.

Whether my conclusions with respect to paragraph XII are correct or not, I am of the view that paragraph XII of the Letters Patent provide the Governor General authority to exercise the royal prerogative of mercy in respect of matters relating to Canada. I have already pointed out in this report that the royal prerogative of mercy was not restricted to criminal offences and criminal convictions. It was also available to the Sovereign to alleviate against sanctions imposed in public proceedings in ecclesiastical courts, the star chamber and elsewhere. To restrict the applicability of the royal prerogative of mercy, I am of the view that there must be a clear statutory provision or legal principle declaring its inapplicability. There is no such statutory provision and no such legal principle.

It was pointed out in the Brusch case that, for certain purposes, the status of a person who is declared to be an habitual criminal is somewhat analogous to the status of a person who has been declared to be not guilty by reason of insanity or who has been found to be insane. The Sovereign can clearly act to provide relief to both of these classes of individuals under the parens patriae prerogative power. As I have already stated, the purpose of the prerogative is to provide relief to the subject and the argument that the prerogative cannot be used to release a man from prison who may have been confined there for many, many years and that that relief would not be available to him because he is being held under some civil status theory does not appeal to me.

I am pleased to discover that a similar argument did not appeal to the Privy Council in the matter of a special reference from the Bahama Islands [1893] A.C. 138 (Sub Nom, re Moseley). In this case, Mr. Moseley was the editor of the Nassau Guardian and published a letter signed "a colonist" which criticized the Chief Justice of the Bahama Islands in responding to two letters the Chief Justice had written to the same paper on questions affecting the health of the town of Nassau. The Chief Justice demanded that Moseley identify the author of the letter, and when Moseley refused, the Chief Justice sentenced Mr. Moseley to be kept in prison during the Chief Justice's pleasure for contempt of Court and of his official position and to pay a fine of £40 to the Court and to be imprisoned until that fine was paid. A deputation of residents of Nassau approached the Governor and urged him to release Mr. Moseley. The Governor sought instructions from the Secretary of State as to whether he had the power to release Moseley and was advised that he had the power and did so.

The Letters Patent constituting the office of Governor of the Bahamas conferred authority "to grant to any offender convicted of any crime in any Court, and before any Judge, Justice or Magistrate within our said Islands, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any real offender, for such period as to our said Governor may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable unto us".[26] Following a complaint by the Chief Justice as to the release of Mr. Moseley, the Secretary of State submitted for reference to the judicial council various questions including a question as to whether the Governor had the power and the circumstances to release Mr. Moseley.

The argument before the Privy Council on behalf of the Chief Justice was as follows:

> With regard to the Governor's power to release, it depends upon whether Mr. Moseley was a person convicted of crime within the meaning of the Governor's Letters Patent. He was not convicted of crime, and therefore neither the Crown nor Governor had power to pardon him. Contempt of Court was a civil proceeding.

The Privy Council did not agree with these submissions and found:

> 3. That the royal prerogative extends to the remissions of sentences which are merely of a punitive character, inflicted for contempt of Court, that the commission of the Governor of the Bahamas Islands vested in him the power to exercise the royal prerogative in this respect, and that he had therefore power, in the circumstances, to order the release of Mr. Moseley.

I am of the view that the Governor General of Canada is in a like position and that, for the purposes of construing his Letters Patent, he is entitled to exercise those powers set forth in paragraph XII of the Letters Patent or to exercise those powers that Her Majesty would be entitled to under the royal prerogative pursuant to the delegated authority set forth in paragraph II of the Letters Patent.

The royal prerogative of mercy has been used in England a total of eighteen times to remit sentences of preventive detention. There follows Table 3 setting forth the exercise of the royal prerogative of mercy in the United Kingdom.

TABLE 3

EXERCISE OF THE ROYAL PREROGATIVE OF MERCY TO REMIT SENTENCES OF PREVENTIVE DETENTION 1908-48

Year	Total	Grounds			
		In simple mitigation of sentence	On medical grounds	On account of technical irregularity in the conviction or sentence	As a reward for information given or assistance rendered by prisoner
1908-9	0				
1910	3	3			
1911	0				
1912	1	1			
1913	0				
1914	0				
1915	1		1		
1916-23	0				
1924	7			7(1)	
1925	1(2)	1			
1926	1				1
1927-30	0				
1931	1(3)		1		
1932-7	0				
1938	1	1			
1939-48(4)	-				
1949	0				
TOTAL	16	6	2	7	1

(1) Cases arising as a result of the Court of Appeal judgment in the case of Norman (Cr App R 1924-25 vol xviii p81).

(2) A sentence of preventive detention remanet was remitted here. When a convict was released on licence he was liable, if again convicted to undergo a term of preventive detention equal to the portion of his original sentence unexpired at the time of his release. This was known as remanet.

(3) Sentences of both penal servitude and preventive detention were remitted in this case.

(4) Figures relating to the exercise of the Royal Prerogative of Mercy were not included in the Criminal Statistics published for the period 1939-48.

The power to pardon has been utilized in this country to grant relief to persons convicted of the most serious offence alleged in the Criminal Code - murder. On July 17, 1981, a conditional pardon was granted to James Ross Davis. Mr. Davis was convicted on November 5, 1976 of a second degree murder which had occurred on April 1, 1976. At the time of his conviction, he was sixteen years of age (his date of birth being January 20, 1960). The reason for granting Davis' release was that:

> It is believed that it is inequitable that Davis having regard to the circumstances of his offence and his age, at the time, should be required to spend a further part of his formative years in penitentiary in company with hardened criminals.

Conditions under which the pardon was granted required:

(a) that he remain under the authority of a supervisor;

(b) that he reside in a community residential centre for at least a period of one month;

(c) that he report to the supervisor or to police officials in accordance with instructions from the supervisor;

(d) that he shall not leave the area in which he resides without approval of the supervisor,

and other similar conditions analogous to those of a person on parole. I am of the view that pardon power provides the most appropriate mechanism for providing relief to those habitual criminals deserving of such relief and that it provides for appropriate flexibility in dealing with the different levels of achievements in the community that the various habitual criminals have attained.

FOOTNOTES - CHAPTER 4

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1 Hatchwell v The Queen (1974) 21 CCC (2d) 201, 3 N.R. 571 (S.C.C.).

2 Percy Mitchell v Her Majesty The Queen (1984) 6 C.C.C. (3d) 193.

3 Criminal Records Act, R.S.B. 1970, Chap. 12 (1st Supp.).

4 The Letters Patent constituting the Office of Governor General of Canada, R.S.C., 1970 Appendices at pp.449 and 446.

5 The Interpretation Act, R.S.C. 1970, Chap. I-23 as amended.

6 By the preamble to the British North America Act, 1867 30 & 31 Victoria, c.3, which states that Canada is a Dominion "with a constitution similar in principle to that of the United Kingdom".

7. The Sovereignty of the Law, selections from Blackstone's Commentaries on the Laws of England, ed. Jones, Garreth, p.90.

8 Chitty, Joseph; A Treatise on the Laws of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject "(London: 1820)".

9 Chitty, at p.6

10 The Sovereignty of the Law at p.91 quoting Sir Henry Finch - Law: or Discourse Thereof (London, 1661), pp.84-85.

11 Central London Property Trust Ltd. v Hightrees House Ltd. [1947] K.B. 130.

12 See Attorney General v De Keyser's Royal Hotel [1920] A.C. 208.

13 Brackton on The Laws and Customs of England, p.306.

14 Ehrlich, J.W.; Erlich's Blackstone (Westport, Connecticut) at p.963.

15 *Erlich's Blackstone*, p.964.

16 Chitty, Joseph; *A Treatise on the Laws of the Prerogatives of the Crown*; pp.90-94.

17 Sir Matthew Hales *The Prerogatives of the King*; ed. Yale, D.E.C., (London: 1976) at p.260.

18 See *Thoms* v *Sorrel* (1673) Vaugh 330 at 343.

19 Chitty, J.; *A Treatise on the Laws of the Prerogatives of the Crown*; p8.

20 Chitty, J.; *A Treatise on the Laws of the Prerogatives of the Crown*; p96.

21 See Halsbury's *Laws of England* (4d), paragraph 949 at p.606.

22 *Attorney General (Canada) Attorney General (Ontario)* (1894) 23 S.C.R. 458 at 468-469.

23 *Toronto* v *Toronto Railway* 46 D.L.R. 435.

24 *C.P.R.* v *James Bay Railway* (1905) 36 S.C.R. 42.

25 *Ehrlich's Blackstone*, p.966.

26 *Re Moseley* at p.144.

APPENDIX "A"

RE MITCHELL AND THE QUEEN

DECISIONS AND ORDER

A1

RE MITCHELL AND THE QUEEN

Ontario High Court of Justice, Linden J. July 7, 1983.

Extraordinary remedies — Habeas corpus — Availability — Prison inmate seeking to challenge validity of detention as habitual criminal on basis that continued detention violates Charter of Rights — Provincial superior court has jurisdiction to consider application for habeas corpus with certiorari in aid.

R. v. Miller (1982), 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 141 D.L.R. (3d) 330, 29 C.R. (3d) 153, 29 C.P.C. 159, leave to appeal to S.C.C. granted 45 N.R. 266n, folld

Other cases referred to

Mitchell v. The Queen, [1976] 2 S.C.R. 570, 24 C.C.C. (2d) 241, 61 D.L.R. (3d) 77, [1976] 1 W.W.R. 577, 6 N.R. 389; *Re Cardinal and Oswald and The Queen* (1982), 67 C.C.C. (2d) 252, 137 D.L.R. (3d) 145, [1982] 3 W.W.R. 593, 35 B.C.L.R. 201, *sub nom. Cardinal and Oswald v. Director of Kent Institution*; *Re Cadeddu and The Queen* (1983), 40 O.R. (2d) 128, 4 C.C.C. (3d) 97, 146 D.L.R. (3d) 629; abated 41 O.R. (2d) 481, 4 C.C.C. (3d) 112, 146 D.L.R. (3d) 653

Constitutional law — Charter of Rights — Enforcement of rights — Inmate seeking to challenge validity of detention as habitual criminal on basis that continued detention violates Charter of Rights — Provincial superior court court of competent jurisdiction — Jurisdiction similar to superior court's jurisdiction on habeas corpus applications — Canadian Charter of Rights and Freedoms, s. 24(1).

Cases referred to

R. v. Brooks et al. (1982), 38 O.R. (2d) 545, 1 C.C.C. (3d) 506, 143 D.L.R. (3d) 482, 2 C.R.R. 246; *Re Krakowski and The Queen* (1983), 41 O.R. (2d) 321, 4 C.C.C. (3d) 188, 146 D.L.R. (3d) 760

Constitutional law — Charter of Rights — Arbitrary detention or imprisonment — Inmate found to be habitual criminal and sentenced to indeterminate detention in penitentiary — Inmate twice released on parole but parole revoked — Inmate having spent 12 years in custody as habitual criminal — Whether inmate's continued detention violates guarantee against arbitrary detention or imprisonment — Meaning of "arbitrary" — Canadian Charter of Rights and Freedoms, s. 9.

Constitutional law — Charter of Rights — Interpretation — Use of International Covenant on Civil and Political rights as aid to interpretation — Prison inmate seeking to rely on provision of International Covenant as aid to interpretation of Charter provisions respecting protection against arbitrary detention or imprisonment and cruel and unusual punishment — International Covenant giving wider protection than explicit guarantee in Charter — Whether court may resort to International Covenant as aid to interpretation in circumstances — International Covenant on Civil and Political Rights, art. 15(1) — Canadian Charter of Rights and Freedoms, ss. 9, 11(i), 12.

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Inmate found to be habitual criminal and sentenced to period of indeterminate detention — Habitual criminal legislation since repealed — Inmate's prior criminal record consisting mainly of petty property offences —

Inmate held in custody for 12 years — Whether inmate's continued detention constitutes cruel and unusual treatment or punishment — Whether treatment cruel and unusual if disproportionate to offence and offender — Whether inmate entitled to release if he can demonstrate that no longer danger to public within meaning of present dangerous offender legislation — Canadian Charter of Rights and Freedoms, ss. 11(i), 12, 24 — Cr. Code, ss. 688, 709.

In 1970 the applicant, a penitentiary inmate, was found to be a habitual criminal and sentenced to detention in a penitentiary for an indeterminate period. The provisions under which the applicant was sentenced had since been repealed and replaced by dangerous offender legislation. The applicant had a criminal record which consisted primarily of petty property offences. He had been released on parole on two occasions but on each occasion his parole was revoked and he was returned to the penitentiary. The applicant had now spent 12 years in the penitentiary under the indeterminate sentence and now applied for *habeas corpus* with *certiorari* in aid or for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* on the basis that his continued detention violated the provisions of ss. 9 and 12 of the Charter. Those provisions contain guarantees against arbitrary detention or imprisonment and cruel and unusual treatment or punishment respectively. The applicant also sought to rely on art. 15(1) of the International Covenant on Civil and Political Rights as an aid to interpreting ss. 9 and 12. Article 15(1) provides in part that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby".

Held, the application should be allowed in part. Although art. 2 of the International Covenant obligates Canada to adopt measures to give effect to its provisions, no Canadian legislation has been passed which expressly implements the Covenant. Nevertheless, it may be that the provisions of the Covenant can serve as an aid to the interpretation of the provisions of the Charter. It is apparent that the framers of the Charter looked to the Covenant when drafting the provisions of the Charter and contemplated that the courts would resort to Canada's international human rights obligations to help to interpret the Charter. However, art. 15(1) of the Covenant was of no assistance in interpreting ss. 9 and 12 of the Charter in view of the clear conflict between art. 15(1) and a specific provision of the Charter, namely, s. 11(*i*), which provides that "any person charged with an offence has the right . . . (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment". Section 11(*i*) gives the accused the advantage of the lesser penalty only if the change comes before he is sentenced and not at any time after his conviction as appears to be the case under art. 15(1). In Canada, the benefit of the lesser punishment extends beyond conviction until the time of sentencing, but no further.

It could not be said that the applicant's continued detention as a habitual criminal was a violation of the guarantee in s. 9 of the Charter against arbitrary detention or imprisonment. While the right to attack a procedure under s. 9 is not foreclosed merely by the fact that the procedure is set out in a statute and followed by a judge, since the court is required to scrutinize the procedure itself to determine whether it is arbitrary in the sense of being capricious, unreasonable, or unjustifiable, it could not be said that the procedure in this case was arbitrary in this sense. Although the habitual criminal legislation had been repealed, transitional provisions provided for the Parole Board to continue to review the inmate's detention and to grant parole in accordance with the guidelines set out in s.

A3

10(1)(a) of the *Parole Act*, R.S.C. 1970, c. P-2. There was nothing inherently capricious or unreasonable about this procedure, and since the applicant had not adduced any evidence as to the criteria the Parole Board in fact employed to review his detention it could not be said that his continued detention contravened s. 9.

On the other hand, it was possible that the applicant's continued detention did violate the guarantee against cruel and unusual treatment or punishment in s. 12 of the Charter. Detention of a habitual criminal is "punishment" even though its primary purpose is the protection of the public, and is certainly "treatment" within the meaning s. 12. The standard to be applied in determining whether treatment or punishment is cruel and unusual is whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. The issue is whether the treatment or punishment is disproportionate to the offence and the offender. Thus, evidence that the treatment or punishment is unusually severe and excessive, in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment, will suffice to satisfy the test of disproportionality. Evidence of arbitrary imposition of the punishment, while relevant, is not a prerequisite to a finding of disproportionality. The treatment of the applicant in this case was certainly severe. Continuing to detain a person found to be a habitual criminal as a result of mainly petty property offences for an indeterminate period of time in excess of 12 years must be considered unduly severe in light of the maximum limits of punishment for serious *Criminal Code* offences. The continued detention of the applicant could have no general deterrent effect inasmuch as the habitual criminal legislation had been repealed. As well, if individual deterrence was the purpose of the detention then surely 12 years in custody had more than fulfilled that aim. If the applicant had not been deterred by 12 years of detention then it was doubtful that he could be deterred by any further incarceration. Continued detention of a person found to be a habitual criminal did not serve any valid penal purpose more effectively than a less severe treatment or punishment if the applicant was not a menace to society. If the applicant was not a danger to society then to detain him for more than 12 years surpassed all rational bounds of treatment or punishment and was so excessive as to outrage standards of decency. Accordingly, the applicant's right to protection against cruel and unusual treatment or punishment may have been infringed and the applicant may be entitled to relief pursuant to s. 24(1) of the Charter. However, there was no evidence presently before the court as to whether the applicant continued to be a danger to the public. In the circumstances, the appropriate disposition was for the court to exercise its jurisdiction under s. 709 of the *Criminal Code* and to order the further detention of the applicant with the applicant being entitled to apply to the court to fix a date for the continuation of the proceedings if, within 60 days, the Parole Board had not released him from custody and no appeal had been taken from the court's order. At the continuation of the application the onus would be on the applicant to establish that he was not a danger to society within the meaning of s. 688 of the present *Criminal Code* which defines a dangerous offender.

Collin et al. v. Kaplan et al. (1982), 1 C.C.C. (3d) 309, 143 D.L.R. (3d) 121, 2 C.R.R. 352; *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152, 1 C.R.R. 346; *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401, 63 D.L.R. (3d) 193, [1975] 6 W.W.R. 1, 33 C.R.N.S. 129; affd [1977] 2 S.C.R. 680, 31 C.C.C. (2d) 177, 70 D.L.R. (3d) 324, [1976] 5 W.W.R. 711, 38 C.R.N.S. 139, 11 N.R. 386; *McCann et al. v. The Queen et al.* (1975), 29 C.C.C.

(2d) 337, 68 D.L.R. (3d) 661, [1976] 1 F.C. 570; *R. v. Shand* (1976), 13 O.R. (2d) 65, 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395, 35 C.R.N.S. 202; leave to appeal to S.C.C. refused December 6, 1976, consd

Other cases referred to

Hatchwell v. The Queen, [1976] 1 S.C.R. 39, 21 C.C.C. (2d) 201, 54 D.L.R. (3d) 419, [1975] 4 W.W.R. 69, 3 N.R. 571; *Re Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495, [1932] 2 D.L.R. 250, 39 C.R.C. 161; *A.-G. Can. v. A.-G. Ont.*, [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299; *R. v. Secretary of State for Home Affairs et al., Ex p. Singh*, [1975] 2 All E.R. 1081; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Com'n et al.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, 18 N.R. 181; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408, 33 R.F.L. (2d) 279; *Re Van Dusen* (1982), United Nations Human Rights Committee Communication No. R. 12/50; *Coogans v. MacDonald*, [1954] S.L.T. 279; *R. v. Roestad*, [1972] 1 O.R. 814, 5 C.C.C. (2d) 564, 19 C.R.N.S. 190; leave to appeal to Ont. C.A. refused 19 C.R.N.S. 235*n*; *Levitz v. Ryan*, [1972] 3 O.R. 783, 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519; *R. v. Simon* (1982), 68 C.C.C. (2d) 86, 137 D.L.R. (3d) 231, [1982] 4 W.W.R. 71, 38 A.R. 377, 2 C.R.R. 74; *R. v. Newall et al. (No. 4)* (1982), 70 C.C.C. (2d) 10, 141 D.L.R. (3d) 26 *sub nom. R. v. Newall et al. (No. 3)*, 2 C.R.R. 156; *R. v. Frankforth* (1982), 70 C.C.C. (2d) 448; *R. v. McGregor* (1983), 3 C.C.C. (3d) 200, 145 D.L.R. (3d) 489; *R. v. Saxell* (1980), 33 O.R. (2d) 78, 59 C.C.C. (2d) 176, 123 D.L.R. (3d) 369; *Furman v. Georgia* (1972), 408 U.S. 238; *Gregg v. State of Georgia* (1976), 96 S. Ct. 2909; stay granted 96 S. Ct. 3235; rehearing denied 97 S. Ct. 197; *R. v. Simon (No. 3)* (1982), 69 C.C.C. (2d) 557, 141 D.L.R. (3d) 380, [1982] 5 W.W.R. 728, 38 A.R. 393, 2 C.R.R. 115; *Ex parte Matticks* (1973), 15 C.C.C. (2d) 213*n*, [1973] S.C.R. vi *sub nom. Pearson v. Lecorre*; *Re Baker and The Queen* (1981), 60 C.C.C. (2d) 476, 23 C.R. (3d) 52; *Re Ferreira and The Queen* (1981), 58 C.C.C. (2d) 147, [1981] 3 W.W.R. 737; *Kenny v. A.-G. Can. et al.*, [1977] 5 W.W.R. 393

Statutes referred to

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*a*), (*b*)
Canadian Charter of Rights and Freedoms, ss. 9, 11(*i*) 12, 24(1), 52
Criminal Code, 1953-54 (Can.), c. 51, ss. 659 (am. 1960-61, c. 43, s. 32; 1968-69, c. 38, s. 76 — now R.S.C. 1970, c. C-34, s. 687); 660 (am. 1960-61, c. 43, s. 33; 1968-69, c. 38, s. 77 — now s. 688); 666 (am. 1958, c. 38, s. 24(5); 1960-61, c. 43, s. 39; 1966-67, c. 25, s. 45 — later s. 694)
Criminal Code, R.S.C. 1970, c. C-34, ss. 204, 228 (am. 1981-82, c. 25, s. 17); 245.2 (enacted 1981-82, c. 25, s. 19); 241.1 (enacted *idem*); 246.2 (enacted *idem*); 294(*a*) (rep. & sub. 1972, c. 13, s. 23; 1974-75-76, c. 93, s. 25); 338(1)(*a*) (am. 1974-75-76, c. 93, s. 32); 617, 687 (rep. & sub. 1976-77, c. 53, s. 14); 688 (rep. & sub. *idem*); 695.1(2) (enacted *idem*); 709
Criminal Law Amendment Act, 1976-77 (Can.), c. 53, s. 15(2)
Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 18
International Covenant on Civil and Political Rights (1976), arts. 2, 15
Interpretation Act, R.S.C. 1970, c. I-23, s. 36(*e*)
Parole Act, R.S.C. 1970, c. P-2, s. 10(1)(*a*)
Supreme Court Act, R.S.C. 1970, c. S-19, s. 41 (am. 1974-75-76, c. 18, s. 5)

APPLICATION for writ of *habeas corpus* with *certiorari* in aid and relief pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

R. R. Price, Q.C., for applicant.
J. C. Pearson, for respondent, Attorney-General of Ontario.
B. R. Evernden, for respondent, Attorney-General of Canada.

LINDEN J.:—This is an application by Percy Wayne Mitchell for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, or for relief pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

In 1970, the applicant was found to be a habitual criminal and was sentenced to detention in a penitentiary for an indeterminate period. At the present time, he is incarcerated at the Joyceville federal penitentiary in Ontario, pursuant to that sentence of preventive detention. The imposition of the sentence of preventive detention is not being challenged in this application. Rather, the applicant has invited this court to find that his *continued* detention pursuant to that sentence violates his rights to be protected against cruel and unusual treatment or punishment, and not to be arbitrarily detained or imprisoned. The applicant relies upon changes to the provisions of Part XXI of the *Criminal Code*, R.S.C. 1970, c. C-34, and the enactment of the Charter of Rights in support of these allegations. In addition, he contends that ss. 9 and 12 of the Charter should be interpreted and applied in a manner consistent with Canada's obligations under art. 15 of the United Nations International Covenant on Civil and Political Rights.

I. *Jurisdiction*

Before a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, or relief pursuant to s. 24(1) of the Charter can be granted, the jurisdiction of this court to hear these applications must be established.

The decision of the Supreme Court of Canada in *Mitchell v. The Queen*, [1976] S.C.R. 570, 24 C.C.C. (2d) 241, 61 D.L.R. (3d) 77, calls into question this court's jurisdiction to entertain an application for a writ of *habeas corpus* with *certiorari* in aid. In *Mitchell*, Mr. Justice Ritchie held that a provincial superior court lacks jurisdiction to hear an application for *habeas corpus* with *certiorari* in aid when an act of the federal Parole Board is under review, since s. 18 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), provides that the Trial Division of the Federal Court has the exclusive jurisdiction to issue a writ of *certiorari* against any federal tribunal. Chief Justice Laskin came to the opposite conclusion in his dissenting judgment. The Chief Justice concluded that for the remedy of *habeas corpus* to be effective, it must embrace *certiorari* in aid.

The binding effect of Mr. Justice Ritchie's comments with respect to this issue have been called into question in several subsequent decisions. Both the British Columbia Court of Appeal and the Ontario Court of Appeal have declined to follow his conclusion. In *Re Cardinal and Oswald and The Queen* (1982), 67 C.C.C. (2d) 252, 137 D.L.R. (3d) 145, [1982] 3 W.W.R. 593 *sub nom. Cardinal and Oswald v. Director of Kent Institution*, Mr. Justice Anderson adopted the reasoning of the Chief Justice rather than that of Mr. Justice Ritchie. His Lordship noted that the issue of jurisdiction was essential only to the Chief Justice's opinion. Furthermore, Mr. Justice Ritchie's comments did not form the *ratio* of his decision, and two of the justices concurring with him did not expressly adopt his conclusion with respect to the availability of *certiorari* in the provincial superior courts. The other justices hearing the *Cardinal* appeal agreed with Mr. Justice Anderson's conclusion that the Supreme Court of British Columbia had jurisdiction to order *certiorari* in aid of *habeas corpus* against a federal board.

The Ontario Court of Appeal reached a similar result in *R. v. Miller* (1982), 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 141 D.L.R. (3d) 330. Mr. Justice Cory, for the court, concluded that the opinion of Mr. Justice Richie as to the exclusive jurisdiction of the Federal Court did not represent the opinion of the majority of the Supreme Court, and that it was open to him to adopt the reasoning of Chief Justice Laskin. The court concluded that in order to prevent the remedy of *habeas corpus* from being reduced to a "lifeless ineffectual shell", a provincial superior court must have jurisdiction to consider an application for *habeas corpus* either with *certiorari* in aid, or with affidavit material in support (at p. 50 O.R., p. 139 C.C.C., p. 341 D.L.R.). This decision is under appeal to the Supreme Court of Canada, leave having been granted on November 1, 1982 [45 N.R. 266*n*].

Although I recognize that the decision of our Court of Appeal in *Miller* may not be the final word on this issue, I am in agreement with the views of Mr. Justice Cory. As a result, I find that I have jurisdiction to entertain this application for the issuance of a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid. The fact that the basis for the application is an alleged infringement of the applicant's rights under the Charter does not change my conclusion. I rely upon the decision of Mr. Justice Potts in *R. v. Cadeddu* (unreported, judgment released December 31, 1982, Ont. H.C.J. [since reported 40 O.R. (2d) 128, 4 C.C.C. (3d) 97, 146 D.L.R. (3d) 629]), in that regard. In *Cadeddu*, Mr. Justice Potts entertained and granted an application for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, upon the ground that the applicant's right to liberty and not to be deprived thereof except in accordance with the principles of fundamental justice, as guaranteed by s. 7 of the Charter, had been violated. The Court of Appeal dismissed an appeal from that decision without dealing with the merits (unreported, judgment released April 28, 1983, Ont. C.A. [since reported 41 O.R. (2d) 481, 4 C.C.C. (3d) 112, 146 D.L.R. (3d) 653]).

The alternative type of relief sought in this application is a remedy pursuant to s. 24(1) of the Charter. Whether this court has jurisdiction to entertain an application under s. 24 appears to depend upon the subject-matter of the application, and perhaps the nature of the remedy sought. In *R. v. Brooks et al.* (1982), 38 O.R. (2d) 545, 1 C.C.C. (3d) 506, 143 D.L.R. (3d) 482, Mr. Justice Eberle held that "a court of competent jurisdiction" within the meaning of s. 24(1) means a court having jurisdiction "with respect to the matter that is sought to be enforced under s. 24" (at p. 547 O.R., p. 509 C.C.C., p. 484 D.L.R.). Accordingly, an applicant seeking relief "must look to the general law of the country to see what court is a court of competent jurisdiction to obtain the remedy appropriate in the circumstances" (at p. 547 O.R., p. 510 C.C.C., p. 485 D.L.R.). Similarly, in *Re Krakowski and The Queen* (unreported, judgment given April 7, 1983 [since reported 41 O.R. (2d) 321, 4 C.C.C. (3d) 188, 146 D.L.R. (3d) 760]), the Ontario Court of Appeal held that a court of competent jurisdiction is a court with jurisdiction to deal with the matter before it independently of the Charter. Applying these tests to the case at bar, I find that I have jurisdiction to entertain this application. The subject-matter of the application is a review of the detention of the applicant, and the s. 24 remedy sought is his release from custody. Since this court can exercise a similar jurisdiction on *habeas corpus* applications, I find that I am a court of competent jurisdiction to hear this matter.

Before passing on the merits of the application, it also should be noted that no issue as to the retroactive or retrospective application of the Charter arises on the facts of this case. This application is based upon alleged infringements of the Charter occurring at the present time as a result of the continuing incarceration of the applicant. None of the decisions of the various courts and of the Parole Board are being challenged. Nor is the legality of the detention of the applicant prior to the coming into force of the Charter under attack.

II. *Factual background*

The applicant was born on June 29, 1922. His first conviction was in 1939, for attempted theft. Since that time, he has been convicted of numerous property offences and sentenced to varying periods of incarceration. He has also been convicted of assaulting a police officer, attempting to escape from custody, and three counts of armed robbery. In an affidavit filed before this court, the applicant swears that his convictions for armed robbery did not involve the use of a weapon.

In June, 1969, the applicant was convicted of 14 property offences, each charge involving amounts under $50. He was sentenced to concurrent sentences of two years for each charge. In August of that year, the Quebec Minister of Justice brought an application to have the applicant declared a habitual criminal. The criteria for making such a finding was set out in s. 660 of the *Criminal Code*, 1953-54 (Can.), c. 51 (as amended 1960-61, c. 43, s. 33(1)):

> 660(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if
>
> (*a*) the accused is found to be an habitual criminal, and
>
> (*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.
>
> (2) For the purposes of subsection (1), an accused is an habitual criminal if
>
> (*a*) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or
>
> (*b*) he has been previously sentenced to preventive detention.

On August 17, 1970, His Honour Judge Laganiere of the Quebec Sessions Court found the applicant to be a habitual criminal, and sentenced him to preventive detention. By virtue of s. 659, preventive detention meant detention in a penitentiary for an indeterminate period. The *Code* required the Solicitor-General of Canada to review the "condition, history and circumstances" of a person sentenced to preventive detention at least once a year:

> 666. . . . for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.

In September, 1970, the applicant launched an appeal against the finding that he was a habitual criminal and the sentence of preventive detention. The Quebec Court of Appeal dismissed the appeal in March, 1973. The applicant then applied for leave to appeal to the Supreme Court of Canada. That application also was refused.

In January, 1976, the applicant was released on parole. Approximately six months later, he was taken back into custody due to a parole violation. No evidence was adduced as to the nature of the parole violation, although it appears from his criminal record that it may have involved a charge of using a stolen credit card.

The provisions of the *Code* pursuant to which the applicant was sentenced to preventive detention were repealed in 1977, and new provisions substituted. The new provisions of Part XXI of the *Code* enable a court to sentence a "dangerous offender" to an indeterminate period of incarceration in a penitentiary.

> 687. In this Part,
>
> "court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;
>
> "serious personal injury offence" means
>
> (*a*) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (*b*) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).
>
> 688. Where, upon an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court
>
> (*a*) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (*a*) of the definition of that expression in section 687 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,

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> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or
>
> (*b*) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (*b*) of the definition of that expression in section 687 and the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,
>
> the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted.

The emphasis thus has been shifted to protecting society from persons who are likely to continue to commit crimes which seriously endanger members of the public.

This change apparently was brought about in response to the decision of the Supreme Court of Canada in *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, 21 C.C.C. (2d) 201, 54 D.L.R. (3d) 419, and the Report of the Canadian Committee on Corrections (the Ouimet Report). In 1969, the Committee of Corrections concluded that the habitual offender legislation should be repealed and replaced by dangerous offender legislation [at pp. 257-8]:

> In recommending the repeal of the existing habitual offender legislation, the committee has been influenced by the following considerations:
>
> (a) The present legislation is broad enough to bring within its reach persistent petty offenders, many of whom are essentially inadequate, non-dangerous people.
>
> (b) The present legislation has in fact been applied, in a substantial percentage of cases where it has been invoked, to persistent offenders, who while constituting a serious social nuisance, are not dangerous. The Committee considers that such persistent offenders can be appropriately dealt with by substantial sentences, when warranted, under the appropriate provisions of the Code.
>
> (c) The present habitual offender legislation is so framed that many seriously dangerous offenders are beyond its reach because of the requirement of three previous convictions for an indictable offence for which the offender could have been sentenced to imprisonment for five years or more. The present legislation does not protect

> society against the offenders from whom society requires maximum protection.

It is apparent that most of the committee's recommendations were adopted by the framers of the new legislation.

On December 19, 1974, the Supreme Court of Canada released its judgment in *Hatchwell*. In that decision, the court restricted the application of the habitual criminal provisions of the *Code*. Mr. Justice Dickson, speaking for the court, observed [at pp. 43-4 S.C.R., p. 206 C.C.C., p. 425 D.L.R.]:

> Habitual criminal legislation and preventive detention are primarily designed for the persistent dangerous criminal and not for those with a prolonged record of minor offences against property. The dominant purpose is to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb. In those cases the way is clear and the word "menace" seems particularly apt and significant. That is not to say that crimes against property can never be cause for the invocation of preventive detention legislation, for the legislation contains no such exclusion and society is undoubtedly entitled to reasonable protection against crimes involving loss of or damage to property. It would seem to me, however, that when one is dealing with crime of this type, seeking to distinguish between that which is menace and that which is nuisance, there is greater opportunity and indeed necessity to assess carefully the true nature and gravity of the potential threat. For it is manifest that some crimes affecting property are very serious and others are not.

Although the new provisions of the *Code* substantially altered the criteria for sentencing offenders to an indefinite period, transitional provisions also were enacted to continue the detention of persons found to be habitual criminals and sentenced to preventive detention under the old legislation. Section 15(2) of the *Criminal Law Amendment Act*, 1976-77 (Can.), c. 53, provides:

> 15(2) Sections 693 to 695 of the *Criminal Code*, as enacted by section 14 apply to a person who, before the coming into force of that section, was sentenced to preventive detention under Part XXI of the *Criminal Code* as if the references in those sections to "a sentence of detention in a penitentiary for an indeterminate period" were references to "a sentence of preventive detention".

Section 695.1(2) of the new legislation also makes provision for such offenders:

> 695.1(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before the *Criminal Law Amendment Act, 1977* came into force, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the *Parole Act* and, if so, on what conditions.

Thus, the applicant continued to be held in custody after the new provisions of Part XXI of the *Code* came into effect. The applicant again appealed to the Quebec Court of Appeal in May, 1978, to review his status under the sentence of preventive detention. The court refused the applicant's request to reverse or alter its earlier judgment, primarily on procedural grounds. The court found that the applicant had not satisfied the requirements set out in the Quebec Rules of Practice for obtaining the type of relief sought. The Quebec Court of Appeal observed that three other means of obtaining relief were available to the applicant, namely, an appeal to the Supreme Court of Canada pursuant to s. 41 of the *Supreme Court Act*, R.S.C. 1970, c. S-19, an application for review by the Parole Board under s. 695.1(2) of the *Code*, and an application to the Minister of Justice pursuant to s. 617 of the *Code*. The applicant apparently has not pursued any of these alternatives.

In September, 1981, the applicant was paroled for the second time. He was taken back into custody in April, 1982, and his parole was suspended. On April 26, 1982, in Ottawa, Ontario, he was convicted of three property offences, and sentenced to a total of one year imprisonment. On June 10, 1982, his parole was revoked. The sentences imposed upon him in April, 1982 expired on April 25, 1983, and the applicant would have been eligible for release on mandatory supervision on December 26, 1982. The only reason for his continued incarceration at the present time is the sentence of preventive detention which was imposed upon him in 1970.

III. *The International Covenant on Civil and Political Rights*

On May 19, 1976, Canada acceded to the United Nations International Covenant on Civil and Political Rights. The Covenant came into force for Canada three months later, on August 19, 1976. Although art. 2 of the Covenant obligates Canada to adopt measures to give effect to the rights recognized therein, no Canadian legislation has been passed which expressly implements the Covenant. Such enabling legislation is required in order to make the Covenant part of the domestic law of Canada: see *Re Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495 at pp. 509-10, [1932] 2 D.L.R. 250 at pp. 259-60, 39 C.R.C. 161 (S.C.C.); *A.-G. Can. v. A.-G. Ont.*, [1937] 1 D.L.R. 673 at p. 678, [1937] A.C. 326 at p. 347, [1937] 1 W.W.R. 299 (J.C.P.C.); *Collin et al. v. Kaplan et al.* (1982), 1 C.C.C. (3d) 309 at pp. 310-1, 143 D.L.R. (3d) 121 at pp. 122-3, 2 C.R.R. 352 (F.C.T.D.); Department of the Secretary of State, *International Covenant on Civil and Political Rights:*

Report of Canada on Implementation of the Provisions of the Covenant (1979), p. 3. The force and effect of the Covenant in Canada thus is limited (at p. 6):

> Since the Covenant was not incorporated into domestic law and, therefore, does not have force of law at the federal, provincial and territorial levels, an individual cannot base a recourse on the Covenant itself if there has occurred within Canada a breach of a right or freedom therein recognized.

The Covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute, notwithstanding the fact that the Covenant has not been formally incorporated into the law of Canada, provided that the domestic statute does not contain express provisions contrary to or inconsistent with the Covenant. If such contrary provisions exist, the Covenant cannot prevail: see *R. v. Secretary of State for Home Affairs et al., Ex p. Singh*, [1975] 2 All E.R. 1081 at p. 1083 (Eng. C.A.); *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Com'n et al.*, [1978] 2 S.C.R. 141 at pp. 172-3 and pp. 187-8, 81 D.L.R. (3d) 609 at p. 631 and pp. 641-2, 36 C.P.R. (2d) 1 (S.C.C.); Peter W. Hogg, *Constitutional Law of Canada* (1977), at p. 186; John Claydon, "The Application of International Human Rights Law by Canadian Courts", 30 Buffalo L. Rev. 727 (1981), pp. 737-8. This rule of construction is based on the presumption that Parliament does not intend to act in violation of Canada's international obligations: M. Cohen and A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law", 61 Can. Bar Rev. 265 at p. 298 (1983).

The applicant submits that ss. 9 and 12 of the Charter are vague and ambiguous, and that this court should look to the Covenant for assistance in determining their meaning. It appears that the framers of the Charter looked to the Covenant when drafting the provisions of the Charter, and contemplated that the courts would resort to Canada's international human rights obligations to help to interpret the Charter: John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", 4 Supreme Court L.R. 287 at pp. 287-8 (1982). At least one commentator has recognized the assistance to be derived from the International Covenant when interpreting the Charter (E. G. Ewaschuk, Q.C., "The Charter: An Overview and Remedies", 26 C.R. (3d) 54 at p. 59):

> In addition to current Canadian law, resort for interpretative guidance may also be made to the International Covenant on Civil and Political Rights adopted by the United Nations in 1966, signed by the federal government in 1976 and agreed to by the provinces in the same year. Interpretations by the United Nations Human Rights Committee of similar provisions in the

> Covenant to those in the Charter may cast light on the minimal requirements imposed on the federal and provincial governments by the Charter. Similarly, it may prove useful to resort to decisions rendered under the European Human Rights Commission and Court. Recourse to the Covenant and the European Convention may also prove useful in identifying the kind of limits which may reasonably be imposed on Charter rights, since both documents specify in some detail limits which may be recognized as necessary in a democratic society.

See also M. L. Friedland, Q.C., "Legal Rights Under the Charter" (1981-82), 24 Crim. L.Q. 430 at p. 431.

I cannot accept the respondents' submission that ss. 9 and 12 of the Charter are clear and unambiguous, and that there is no need to resort to the Covenant in order to ascertain their meaning. In *Re Gittens and the Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152 (F.C.T.D.), Mr. Justice Mahoney identified three different approaches which have been used by Canadian courts since the enactment of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, to interpret the term "cruel and unusual punishment". Although the meaning of "arbitrary detention" may be somewhat less ambiguous, neither can the content of that phrase be regarded as completely clear. So long as the Charter's "capability for growth" is recognized by the courts, there will be room for new interpretations of the rights entrenched therein: see *Re Southam Inc. and The Queen (No. 1)*, unreported, judgment released March 31, 1983, at p. 16 [since reported 41 O.R. (2d) 113 at p. 123, 3 C.C.C. (3d) 515 at p. 524, 146 D.L.R. (3d) 408 at p. 418] (Ont. C.A.). As was urged by M. Cohen and A. Bayefsky, *supra*, at p. 305:

> In the context of the Charter, where considerable difficulty of interpretation will arise, and the conventions are potentially helpful, it would seem justifiable for our courts to lean against a narrow application of the ambiguity requirement and in favour of having recourse to these aids.

The applicant submits that ss. 9 and 12 of the Charter must be interpreted in light of the last sentence of art. 15, para. 1 of the International Covenant:

> ARTICLE 15
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

I agree with the applicant that a sentence of preventive detention should be regarded as a "penalty" within the meaning of art. 15:

see *Re Van Duzen* (April 23, 1982), United Nations Human Rights Committee Communication No. R. 12/50; *Coogans v. MacDonald*, 1954 S.L.T. 279 at p. 281.

However, there appears to be a conflict between another provision of the Charter and art. 15 of the Covenant, which prevents me from using art. 15 to help to determine the meaning of ss. 9 and 12. The last sentence in para. 1 of art. 15 gives an offender the right to the benefit of a lighter penalty when the penalty is changed subsequent to the commission of an offence. This provision appears to apply at *any* time after the commission of an offence, even after the offender has been sentenced: H.N.A. Noor Muhammad, "Due Process of Law for Persons accused of Crime" in *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), edited by Louis Henkin, p. 138 at p. 164.

On the other hand, however, s. 11(*i*) of the Charter of Rights guarantees a more limited right:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

This section gives the accused the advantage of the lesser penalty only if the change comes before he is sentenced — not any time after his conviction.

According to one observer, "This is a point on which the wording of s. 11(i) is very clear and contrasts . . . with art. 15 of the International Covenant on Civil and Political Rights": François Chevrette, "Protection Upon Arrest or Detention and Against Retroactive Penal Law" in *The Canadian Charter of Rights and Freedoms: Commentary* (1982), edited by W. S. Tarnopolsky (now Tarnopolsky J.A.) and G.-A. Beaudoin, at p. 330.

Section 11(*i*) of the Charter is consistent with s. 36(*e*) of the *Interpretation Act*, R.S.C. 1970, c. I-23:

> 36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,
>
> . . . . .
>
> (*e*) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

Thus, under Canadian law as it stood prior to the enactment of the Charter, there was no generally applicable statutory provision enabling a person convicted of an offence to be given a reduced penalty if, at any time following *conviction*, a new statute provided for a lighter penalty; convicted persons could benefit from such a reduction only if punishment were imposed after the repeal or if it was expressly provided for in the statute: *International Covenant on Civil and Political Rights: Report of Canada on Implementation of the Provisions of the Covenant* (1979), at p. 73. Hence, at the present time, the benefit of the lesser punishment extends beyond conviction until the time of sentencing, but no further. Even if "time of sentencing" includes the determination of a final appeal as to sentence, it does not assist the applicant in this case because his application for leave to appeal to the Supreme Court of Canada was dismissed prior to the enactment of the new dangerous offender provisions.

I must conclude (with some reluctance) that I cannot look to art. 15 of the International Covenant for assistance in interpreting ss. 9 and 12 of the Charter, due to the conflict between art. 15 and s. 11(*i*). I do, however, recognize that in other cases it may be appropriate and desirable to have regard to the International Covenant when interpreting provisions of the Charter.

IV. *Arbitrary detention or imprisonment*

The applicant submits that on the facts of this case, to have his detention under sentence of preventive detention continued is to be "arbitrarily detained or imprisoned", contrary to s. 9 of the Charter.

Canadian courts have sought to define the word "arbitrary" since the enactment of the *Bill of Rights*. For example, in *R. v. Roestad*, [1972] 1 O.R. 814, 5 C.C.C. (2d) 564, 19 C.R.N.S. 190 (Ont.Co.Ct.), His Honour Judge Graburn relied upon the Concise Oxford Dictionary which defined "arbitrary" as meaning "derived from mere opinion; capricious; unrestrained; despotic; or discretionary" (p. 817 O.R., p. 567 C.C.C.). Similarly, in *Levitz v. Ryan*, [1972] 3 O.R. 783, 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519 (Ont. C.A.), Mr. Justice Arnup held that "arbitrary" means "unreasonable or capricious" (p. 790 O.R., p. 189 C.C.C., p. 526 D.L.R.). These approaches have been followed by courts considering the meaning of s. 9 of the Charter. In *R. v. Simon* (1982), 68 C.C.C. (2d) 86, 137 D.L.R. (3d) 231, [1982] 4 W.W.R. 71 (N.W.T.S.C.), Mr. Justice de Weerdt examined the definitions of "arbitrary" set out in *Roestad* and *Levitz*, and W. S. Tarnopolsky's conclusion as to the meaning of the phrase "arbitrary detention, imprisonment or exile" in s. 2(*a*) of the *Bill of Rights*:

> "... the proscription here is against detention, imprisonment or exile without specific authorization under existing law. And further, that a law giving power to detain, imprison or exile, cannot grant such a power to be exercised 'unreasonably' or 'without just cause'."

(W. S. Tarnopolsky [*Canadian Bill of Rights*, 2nd revised ed. (1975), p. 235] in *Simon* at p. 90 C.C.C., p. 236 D.L.R.) His Lordship concluded that arbitrary detention must mean detention which is unreasonable or unjustifiable, or without any rational foundation, in all of the circumstances of the case (at pp. 90-2 C.C.C., pp. 236-8 D.L.R.).

Certain other cases decided since the enactment of the Charter have given considerable attention to the lawfulness of procedures used to detain accused persons. In *R. v. Newall et al. (No. 4)* (1982), 70 C.C.C. (2d) 10, 141 D.L.R. (3d) 26, 2 C.R.R. 156, the Supreme Court of British Columbia held that s. 9 of the Charter (p. 19 C.C.C., p. 36 D.L.R.):

> ". . . is meant to allow the release from incarceration of someone who is wrongly there because the order detaining him was made arbitrarily as compared to judicially. Because I am sentencing each accused in accordance with the law, their subsequent imprisonment is not arbitrary.

In *R. v. Frankforth* (1982), 70 C.C.C. (2d) 448, His Honour Judge MacKinnon of the British Columbia County Court considered the situation of an accused who was being held in custody pursuant to s. 457(5.1) of the *Code*. He concluded that because the accused was not being detained at the whim of the court, but rather by specific procedures enacted by Parliament, his right under s. 9 had not been violated. Mr. Justice Griffiths of the Supreme Court of Ontario reached a similar conclusion in *R. v. McGregor* (unreported, judgment released February 1, 1983 [since reported 3 C.C.C. (3d) 200, 145 D.L.R. (3d) 489]). His Lordship concluded that the taking of fingerprints did not involve any element of arbitrariness (pp. 15-6 [p. 210 C.C.C., p. 499 D.L.R.]):

> The police were not acting in some unreasonable or capricious manner but were simply requiring the respondent to submit to fingerprinting as required by law. In my view, detention by a police officer under the authority of a statute cannot be considered "arbitrary".

These decisions must be interpreted with some caution. In my opinion, they should not be construed to mean that simply because a statute sets out a specific procedure for detaining a person, that statutory procedure is automatically free from arbitrariness. It may be that certain sentencing or detention procedures authorized by statute are *prima facie* capricious or unreasonable. The right to attack such a procedure under s. 9 should not be foreclosed by the fact that the procedure is set out in a statute, and followed by a judge, for to do so would be to ignore s. 52 of the Charter. The procedure itself must be scrutinized in order to determine whether it is arbitrary in the sense of being capricious, unreasonable, or unjustifiable.

The applicant has urged this court to consider his submission that his continued detention is arbitrary in light of the Ontario Court of Appeal decision in *R. v. Saxell* (1980), 33 O.R. (2d) 78, 59 C.C.C. (2d) 176, 123 D.L.R. (3d) 369, and a study of habitual criminals prepared by Professor Michael Jackson of the University of British Columbia Law School: *Sentences That Never End: The Report on The Habitual Criminal Study* (1982). In *Saxell*, the court dismissed the appellant's argument that to detain him for an indefinite period of time following acquittal on account of his insanity at the time of the commission of the offence would be arbitrary. Mr. Justice Weatherston based that conclusion on the fact that there was no evidence before the court that persons such as the appellant continued to be held in custody after they ceased to be a danger to the public (p. 86 O.R., p. 184 C.C.C., p. 377 D.L.R.). The applicant submits Professor Jackson's report as evidence of the fact that most habitual criminals continue to be detained despite the fact they do not qualify as dangerous offenders under the new legislation.

Jackson's report focused upon 18 men who were declared habitual criminals and sentenced to preventive detention under the old provisions of the *Code*, and who were still incarcerated as of September, 1980. Jackson reached 10 conclusions, which included the following (at pp. 27 and 34):

> 1. The great majority of the men in the study have always been regarded as no more than grave social nuisances and have never been regarded as dangerous in terms of their propensity to commit violence.
>
> 2. None of the men in the study can properly be regarded as dangerous offenders within the definitions of the 1977 dangerous offender legislation.
>
> 3. The Parole Board, in concluding its annual reviews since 1977, has not conducted those reviews against the new formulation of the dangerous offender.
>
> 4. Parole reviews of the men in the study, both before and after 1977, have been and are conducted against the legislative criteria of section 10 of the *Parole Act* in which danger to society is only one of the relevant criteria.

Although Professor Jackson's study demonstrates very clearly the unfairness involved in continuing to detain habitual criminals who are not dangerous according to the present provisions of the *Code*, it does not assist me in the determination of whether *this* applicant's continued detention is arbitrary. Section 695.1(2) of the *Code* requires the National Parole Board to review the applicant's condition, history and circumstances once every year for the purpose of determining whether he should be granted parole. Section 10(1)(*a*) of the *Parole Act*, R.S.C. 1970, c. P-2, apparently guides the Board in making that decision:

> 10(1) The Board may
>
> (*a*) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that
>
> (i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment,
>
> (ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and
>
> (iii) the release of the inmate on parole would not constitute an undue risk to society;

The statutes thus provide for mandatory review of a habitual criminal's continued detention, governed by clearly defined standards. I cannot find that there is anything inherently capricious or unreasonable about this procedure. Since no evidence has been adduced by the applicant with respect to what criteria the Board in fact employs to review his detention, I cannot find that the continued detention of this applicant contravenes s. 9 of the Charter. The only evidence that I have before me of how the Parole Board exercises its discretion with regard to this applicant, is the applicant's criminal record, which demonstrates that he has been released on parole on two occasions since 1970. As a result, I must hold that the applicant has failed to establish a *prima facie* violation of his right not to be arbitrarily detained or imprisoned, pursuant to s. 9 of the Charter.

V. *Cruel and unusual treatment or punishment*

The applicant also submits that his continued incarceration under sentence of preventive detention infringes upon his right not to be subjected to any cruel or unusual treatment or punishment.

The first issue to be determined is whether detention pursuant to a sentence of preventive detention constitutes "treatment or punishment". In *Roestad*, *supra*, His Honour Judge Graburn treated the preventive detention of a dangerous sexual offender as punishment, because there was a loss of liberty (p. 825 O.R., p. 574 C.C.C.). However, in *Saxell*, Mr. Justice Weatherston held that detention at the pleasure of the Lieutenant-Governor following acquittal by reason of insanity, "is not punishment at all, but is for the protection of the public and the treatment of the accused" (p. 91 O.R., p. 188 C.C.C., p. 382 D.L.R.). It also has been held that deportation, and the imposition of a suspended sentence, do not constitute "punishment": see *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152, and *R. v. Linklater*, unreported, judgment given December 18, 1982 (Y.T.S.C.).

I am of the view that detention of habitual criminals is "punishment", even though its primary purpose is the protection of the public (see *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39 at p. 43, 21 C.C.C. (2d) 201 at p. 206, 54 D.L.R. (3d) 419 at p. 424), but, even if it is not, then it certainly constitutes "treatment". With respect to s. 12 of the Charter, A.D. Gold has commented:

> Note that "treatment" as well as "punishment" may attract this section's protection. Treatment generally covers any conduct, behaviour or action towards another and, consequently, any disadvantaging of a person, not just that commonly considered punishment, can be attacked as violating this prohibition.

(A.D. Gold, *Annual Review of Criminal Law, 1982* (1982), p. 21.) Deportation, although not punishment, is an example of "treatment" within the meaning of s. 12: see *Re Gittens* at p. 444 C.C.C., p. 693 D.L.R.

The next issue to be examined is the meaning of the phrase "cruel and unusual". In *Re Gittens*, three approaches to defining cruel and unusual treatment or punishment were identified. One approach is to read "cruel and unusual" disjunctively. In *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401, 63 D.L.R. (3d) 193, [1975] 6 W.W.R. 1 (B.C.C.A.), Mr. Justice McIntyre, in his dissent, stated that [at p. 465 C.C.C., p. 257 D.L.R.]:

> . . . it is permissible and preferable to read the words "cruel" and "unusual" disjunctively so that cruel punishments however usual in the ordinary sense of the term could come within the proscription.

This test was followed by Mr. Justice Heald in *McCann et al. v. The Queen et al.* (1975), 29 C.C.C. (2d) 337, 68 D.L.R. (3d) 661, [1976] 1 F.C. 570 (F.C. T.D.).

The second approach is to read "cruel and unusual" conjunctively. Mr. Justice Ritchie, writing for the majority of the Supreme Court of Canada in *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680 at p. 706, 31 C.C.C. (2d) 177 at p. 197, 70 D.L.R. (3d) 324 at p. 345 (S.C.C.), held that:

> . . . the words "cruel and unusual" as they are employed in s. 2(*b*) of the *Bill of Rights* are to be read conjunctively and refer to "treatment or punishment" which is both cruel and unusual.

His Honour Judge Graburn took the same approach in *Roestad*. According to his theory, then, before s. 2(*b*) of the *Bill of Rights* can apply, the punishment must be *both* cruel *and* unusual.

The last approach taken by Canadian courts is to treat the words "cruel and unusual" as one compendious expression. In his minority judgment in *Miller and Cockriell* (S.C.C.), Chief Justice Laskin stated [at pp. 689-90 S.C.R., p. 184 C.C.C., p. 332 D.L.R.]:

> The various judgments in the Supreme Court of the United States, which I would not discount as being irrelevant here, do lend support to the view that "cruel and unusual" are not treated there as conjunctive in the sense of requiring a rigidly separate assessment of each word, each of whose meanings must be met before they become effective against challenged legislation, but rather as interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm. I think this to be a reasonable appraisal, in line with the duty of the Court not to whittle down the protections of the *Canadian Bill of Rights* by a narrow construction of what is a quasi-constitutional document.

In *Re Gittens* Mr. Justice Mahoney adopted the reasoning of Chief Justice Laskin. A similar approach was taken by Mr. Justice Arnup in *R. v. Shand* (1976), 13 O.R. (2d) 65, 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395, 35 C.R.N.S. 202 (Ont. C.A.). In that case, His Lordship held that [at p. 80 O.R., p. 38 C.C.C., p. 410 D.L.R., p. 221 C.R.N.S.]:

> ... there is a "core meaning" to the phrase "cruel and unusual treatment or punishment". It has yet to be distilled and enunciated in Canada. In provincial Courts of Appeal, that process will best be carried out on a case by case basis.

I have decided to follow the last approach in deciding whether the continued detention of the applicant constitutes cruel and unusual treatment or punishment. The words of Chief Justice Laskin, advising against whittling down the protections of the *Bill of Rights* by narrow interpretations, apply with even greater force to the Charter of Rights:

> The Charter as part of a constitutional document should be given a large and liberal construction. The spirit of this new "living tree" planted in friendly Canadian soil should not be stultified by narrow, technical, literal interpretations without regard to its background and purpose; capability for growth must be recognized ...

(*Re Southam Inc. and The Queen (No. 1)*, unreported, judgment released March 31, 1983, at p. 16 [since reported 41 O.R. (2d) 113 at p. 123, 3 C.C.C. (3d) 515 at p. 524, 146 D.L.R. (3d) 408 at p. 418] (Ont. C.A.), *per* MacKinnon A.C.J.O.)

What, then, is the "core meaning" of the right guaranteed by s. 12 of the Charter? When is treatment or punishment cruel and unusual? As indicated above, Canadian courts have not approached this issue in any uniform fashion. However, one recurring theme in Canadian case law dealing with s. 2(*b*) of the *Bill of Rights* is resort to American authorities and the "disproportionality principle".

In his dissent in *Miller and Cockriell* (B.C.C.A.) Mr. Justice McIntyre looked to American authorities to assist him to determine the nature of cruel and unusual punishment. His Lordship recognized that, while American law did not bind him, and rested upon a different constitutional basis, it was helpful in determining principles upon which the matter before him should be considered. He observed that it was necessary to settle upon certain standards by which the punishment in question should be judged. His Lordship concluded that the punishment under scrutiny, the death penalty,

> . . . would amount to cruel and unusual punishment if it cannot be shown that its deterrent value outweighs the objections which can be brought against it. Furthermore, even assuming some deterrent value . . . it would be cruel and unusual if it is not in accord with public standards of decency and propriety, if it is unnecessary because of the existence of adequate alternatives, if it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain.

(Page 468 C.C.C., p. 260 D.L.R.)

This test was followed by Mr. Justice Heald in *McCann*. In that case, His Lordship found that solitary confinement constituted cruel and unusual punishment, because it served no positive penal purpose. Furthermore, it was unnecessary because of the existence of adequate alternatives, and thus was not in accordance with public standards of decency and propriety. The punishment also was found to be unusually severe in nature.

In *Shand*, Mr. Justice Arnup also recognized that "great assistance can be obtained from the American precedents" in attempting to define what is cruel and unusual punishment (p. 79 O.R., pp. 37-8 C.C.C., p. 409 D.L.R., p. 220 C.R.N.S.):

> We recognize that there could be a punishment imposed by Parliament that is so obviously excessive, as going beyond all rational bounds of punishment in the eyes of reasonable and right-thinking Canadians, that it must be characterized as "cruel and unusual". Therefore, we are prepared to accept that the so-called "disproportionality principle", in this sense, has relevance to what is cruel and unusual punishment, but it is a principle that needs to be developed in the Canadian context of our constitution, customs and jurisprudence.

The court held that a minimum sentence of seven years' imprisonment for importing a narcotic was not so disproportionate to the offence as to be cruel and unusual, in view of the magnitude of the national evil at which the penalty was aimed.

Chief Justice Laskin's dissenting judgment in *Miller and Cockriell* (S.C.C.) probably provides the best example of how the Canadian judiciary has utilized American authorities to assist in determining the meaning of the right to protection against cruel and unusual treatment or punishment. The Chief Justice attempted to summarize the effect of the words of s. 2(*b*) of the *Canadian Bill of Rights*, with reference to the English *Bill of Rights* and the Eighth Amendment to the American Constitution. He found that the words of s. 2(*b*) could not be limited only to methods of punishment. Section 2(*b*) must also apply to the excessiveness of a penalty (p. 688 S.C.R., p. 183 C.C.C., p. 331 D.L.R.):

> Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(*b*), but I doubt whether a more precise one can be found.

Chief Justice Laskin then proceeded to consider the arguments in the case before him. The appellants' arguments in the Supreme Court of Canada were based upon the judgments of Mr. Justice Brennan of the Supreme Court of the United States in *Furman v. Georgia* (1972), 408 U.S. 238, and *Gregg v. State of Georgia* (1976), 96 S. Ct. 2909. The appellants offered four grounds of challenge to the death penalty based upon those judgments, namely, that:

> (1) the death penalty is unusually severe and hence degrading to human dignity and worth; (2) it is arbitrarily imposed; (3) it is not acceptable to a large segment of the population and (4) it is excessive in that it cannot be shown that it has had any deterrent effect on murder that would not be realized by a punishment that was not so final.

(Page 692 S.C.R., p. 186 C.C.C., p. 334 D.L.R.)

Chief Justice Laskin rejected the argument based upon arbitrary imposition, because the *Criminal Code* provided that imposition of the death penalty was mandatory for capital murder. He also dismissed the claim that the penalty was unacceptable to a large segment of the Canadian population, because that argument appeared to be asking the court "to define and apply s. 2(*b*) by a statistical measure of approval or disapproval of the death penalty" (p. 692 S.C.R., p. 187 C.C.C., p. 334 D.L.R.). He did not believe that that was what s. 2(*b*) called for.

The Chief Justice dealt with the remaining two grounds together. The appellants based the arguments of severity and excessiveness upon the reasons of Justice Brennan in *Furman*. In that case, Justice Brennan propounded a cumulative test for determining whether a punishment is cruel and unusual (at p. 282):

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society,

> and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Chief Justice Laskin was prepared to adopt a less stringent test than that set forth above. He accepted the appellants' submission that if severity and excessiveness alone were established, that would be enough to sustain their attack on the death penalty (pp. 693-4 S.C.R., pp. 187-8 C.C.C., p. 335 D.L.R.).

The Chief Justice approached the submission that the death penalty was excessive and unduly severe in terms of proportionality (p. 694 S.C.R., p. 188 C.C.C., p. 336 D.L.R.):

> What we are concerned with here is not mere degradation by which society expresses its reprobation of criminal behaviour but *the extent of it, related of course to the offence and at times to the offender*. The enormity and the irreversibility of a death penalty when carried out certainly bespeak its undue severity in the abstract, but the present case is concerned with *proportionality*, with mandatory application of the death penalty not to an entire range of the most heinous offences, that is, murder, but to particular and narrow instances of it specially selected by Parliament as meriting the drastic penalty of death.

(My emphasis.)

His Lordship rejected the appellants' arguments that the death penalty was excessive because the purposes of punishment would be equally well served by providing for a lesser punishment. Chief Justice Laskin found that a social purpose beyond mere vengeance was served by the mandatory death penalty, and that there was no convincing proof that deterrence had had no impact. The death penalty thus did not constitute cruel and unusual punishment within s. 2(*b*) of the *Bill of Rights*.

The majority of the Supreme Court of Canada took a very different approach. The court held that since Parliament had re-enacted the death penalty provisions of the *Code* after the *Bill of Rights* was proclaimed, Parliament must not have intended s. 2(*b*) to preclude punishment by death. Mr. Justice Ritchie, in his majority judgment, did not attempt to define the meaning of "cruel and unusual treatment or punishment" beyond holding that "cruel and unusual" should be read conjunctively. Since imposition of the death penalty for murder was not "unusual", capital punishment could not constitute cruel and unusual punishment. Furthermore, since the American Constitution and the *Canadian Bill of Rights* "differ so radically in their purpose and content", Mr. Justice Ritchie found American authorities to be of little value in interpreting s. 2(*b*) (pp. 706-7 S.C.R., p. 198 C.C.C., p. 345 D.L.R.).

The cases decided pursuant to the Charter of Rights have not dealt with the meaning of s. 12 in any detail. For example, in *R. v. Simon (No. 3)* (1982), 69 C.C.C. (2d) 557, 141 D.L.R. (3d) 380, [1982] 5 W.W.R. 728, the Supreme Court of the Northwest Territories simply adopted the decision of the Supreme Court of Canada in *Ex parte Matticks* (1973), 15 C.C.C. (2d) 213*n*, [1973] S.C.R. vi *sub nom. Pearson v. Lecorre*. Since the decision of the Supreme Court in *Matticks* consisted of a bare conclusion that s. 688 of the *Code* was not rendered inoperative by the *Bill of Rights*, this decision is of little assistance in attempting to define the meaning of cruel and unusual treatment or punishment. Similarly, in *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152, the Federal Court did not define cruel and unusual treatment beyond adopting Chief Justice Laskin's statement that it should be treated as one compendious expression. In *Collin et al. v. Kaplan et al.* (1982), 1 C.C.C. (3d) 309, 143 D.L.R. (3d) 121, 2 C.R.R. 352 (F.C.T.D.), Mr. Justice Dube dismissed an application for an interlocutory injunction based upon allegedly cruel and unusual treatment or punishment in Canadian penitentiaries, without commenting upon the meaning of s. 12 of the Charter beyond quoting from and following the general import of an American decision dealing with a similar situation.

The absence of any definitive judicial pronouncements with respect to the meaning of the right guaranteed by s. 12 of the Charter has forced me to come to my own conclusions as to its scope and effect. I find the tests proposed by Chief Justice Laskin in *Miller and Cockriell* and by Mr. Justice Arnup in *Shand* to be of the greatest assistance in this respect. In my opinion, the standard to be applied in determining whether treatment or punishment is cruel and unusual is whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. The test, thus, is one of disproportionality: is this treatment or punishment disproportionate to the offence and the offender? Evidence that the treatment or punishment is unusually severe, and excessive in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment, will suffice to satisfy the test of disproportionality. Evidence of arbitrary imposition also is relevant, but not a prerequisite to a finding of disproportionality where the other two factors are present. I agree with Chief Justice Laskin that public opinion should not play a part in the determination.

The question to be determined in this case is whether the continued detention of *this applicant* constitutes cruel and unusual punishment or treatment. The imposition of an indeterminate sentence *per se* is not under attack. In considering this question, I will proceed on the premise that the applicant can be shown to be no danger to society, and that, under the present law, he could not be found to be a dangerous offender.

The first matter to be considered is the severity of the applicant's treatment. The applicant has been in preventive detention since 1970. Between 1970 and 1983 he has been out of custody on parole for approximately one year in total. Thus, the applicant has already been incarcerated as a consequence of the habitual criminal finding for approximately 12 years. What other *Criminal Code* offences carry maximum sentences of this length? Sexual assault (s. 246.1), criminal negligence causing bodily harm (s. 204), theft over $200 (s. 294(*a*)) and fraud over $200 (s. 338(1)(*a*)) all carry maximum sentences of 10 years' imprisonment. Wounding (s. 228), aggravated assault (s. 245.2) and sexual assault with a weapon (s. 246.2) are examples of offences carrying maximum sentences of 14 years' imprisonment. Continuing to detain a person found to be a habitual criminal as a result of property offences mainly involving amounts under $50, for an indeterminate period of time in excess of 12 years, surely must be unduly severe in light of the maximum limits of punishment for serious *Code* offences. The Jackson study reinforces my conclusion in this regard. Jackson found that the habitual criminals who were the subjects of his study had "served more time than any other group of prisoners in Canada, including those convicted of murder" (p. 45).

The next matter to be examined is whether the continued detention of the applicant is excessive, in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment. The purpose of the old *Code* provisions providing for preventive detention of habitual criminals was the protection of the public: see *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39 at p. 43, 21 C.C.C. (2d) 201 at p. 205, 54 D.L.R. (3d) 419 at p. 424. However, the Ouimet Report demonstrated that the public did not need to be protected from many of the persons being detained as habitual criminals, since they were primarily social nuisances, rather than menaces to the safety of the public (p. 252). Jackson reached a similar conclusion (at p. 27). Apparently this was the reason for the changes in the legislation.

If protection of the public is no longer a valid penological purpose for continuing to detain habitual criminals who are not dangerous, then what is the basis for their detention? The Ouimet Committee found the general deterrent effect of the habitual offender legislation to be "necessarily slight" due to its infrequent application (p. 247). In view of the fact that the legislation has been repealed, I do not see how it can have *any* general deterrent effect at the present time. If individual deterrence is the purpose, then surely 12 years in custody has more than fulfilled this aim. If the applicant has not been deterred by 12 years of detention, then it is doubtful that he will be deterred by any further incarceration. With respect to the other possible purposes of punishment, I adopt the conclusions reached by Jackson (at pp. 49-50):

> In terms of the retributive purposes of punishment . . . it is quite clear that these men have paid over and over again for the harm they have caused and the retributive purpose of punishment has long since been fulfilled. Finally, in terms of reformation, it is equally clear that further incarceration makes the already extremely difficult task of reintegration into the community all the more difficult.

Thus, in the event that this applicant is *not* a menace to society, I conclude that his continued detention for an indefinite time is excessive.

The last factor to be considered is that of arbitrariness. Although the Ouimet Report and Jackson study demonstrate the arbitrariness often involved in the initial imposition of preventive detention (see Ouimet Report at pp. 252-3, and Jackson study at pp. 47-8), there is no evidence before me that this applicant's *continued* detention has been tainted by arbitrariness. As a result, I do not find this factor to be of assistance to the applicant.

On the basis of the factors examined above, I find that the continued detention of the applicant, if in fact he is no more than a social nuisance and not a danger to the public, satisfies the disproportionality test. To continue to detain such a man for more than 12 years surpasses all rational bounds of treatment or punishment, and is so excessive as to outrage standards of decency. The applicant's right to protection against cruel and unusual treatment or punishment thus may have been infringed. Since no evidence has been adduced to satisfy me that such an infringement constitutes a reasonable limit demonstrably justifiable in a free and democratic society, I find that the applicant may be entitled to relief pursuant to s. 24(1) of the Charter, subject to my comments below.

VI. *Remedy*

The relief sought on this application is either the issuance of a writ of *habeas corpus* directing the release of the applicant, or a

s. 24(1) remedy. If the applicant's right under s. 12 of the Charter has in fact been infringed, then his continued detention would be unlawful, and a basis for the issuance of a writ of *habeas corpus*, or for a remedy under s. 24, thus would be established. The problem in this case is that the evidence before this court makes it impossible for me to determine whether s. 12 has been contravened. The determination that the applicant's continued detention is disproportionate, and thus in violation of s. 12, depends upon a finding that he is not a danger to society. I am unable to make such a finding on the evidence before me at this time. In the absence of a determination that the Charter has been infringed, no remedy can be granted pursuant to s. 24.

Although I am not prepared to grant the relief requested, namely, an order releasing the applicant from custody, neither am I prepared to dismiss his application. I have concluded that an alternative remedy open to me is to direct that the applicant remain in custody pending the trial of an issue to determine whether he is a danger to society within the meaning of s. 688 of the present *Criminal Code*. My jurisdiction in this regard is found in s. 709 of the *Code*. Pursuant to s. 709, a court hearing an application for *habeas corpus* has the power to order further detention of the applicant and to direct that further proceedings be taken to further the ends of justice:

> *Detention on inquiry to determine legality of imprisonment*
>
> 709. Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or magistrate under whose warrant he is in custody, or any other judge, justice or magistrate to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.

I am of the opinion that an order under s. 709 can be made on this application. The words "by reason that he . . . has been convicted of an offence" should not be construed so as to exclude a person who has been found to be a habitual criminal, since that finding could only be made following a conviction of an indictable offence: see s. 660 of the *Criminal Code*, 1953-54 (Can.), c. 51 (as amended 1960-61, c. 43, s. 33(1)). Furthermore, an order under s. 709 can be made either after a finding that the detention of the applicant is unlawful (*Re Baker and The Queen* (1981), 60 C.C.C. (2d) 476, 23 C.R. (3d) 52 (B.C.S.C.); *Re Ferreira and The Queen* (1981), 58 C.C.C. (2d) 147, [1981] 3 W.W.R. 737 (B.C.C.A.)), or without determining the legality of the applicant's detention (*Kenny v. A.-G. Can. et al.*, [1977] 5 W.W.R. 393 (B.C.S.C.)). At this time, I am not prepared to determine whether the applicant's right under s. 12 has been infringed, and thus the legality of his detention cannot be determined until the issue has been tried.

VII. *Order*

The terms of my order are as follows. The applicant may apply to this court to fix a date for the continuation of proceedings before me, if, within 60 days from the date of this order, the Parole Board has not released the applicant from custody, and no appeal from this order has been commenced. At the continuation of this application, the onus shall be upon the applicant to establish that he is not a danger to society. The respondents shall have the right to participate fully in the proceedings. If the applicant succeeds in satisfying me that he is not dangerous, this court shall determine the appropriate remedy to be granted, pursuant either to the application for a writ of *habeas corpus*, or the application for relief under s. 24(1) of the Charter.

Judgment accordingly.

REGINA v. WOSZCZYNA
REGINA v. SOUCY

Ontario Court of Appeal, Martin, Weatherston and Robins JJ.A. June 2, 1983.

Prostitution — Keeping common bawdy-house — Accused owner and directing mind of corporation running steam-bath — Steam-bath found to be common bawdy-house — Evidence that accused participated in management of premises, received proceeds from operation and hired and paid staff and other expenses — Evidence that accused aware of activities on premises — Whether accused may be convicted of keeping common bawdy-house — Whether Crown required to prove that accused participated in day-to-day running of premises — Cr. Code, ss. 179, 193.

An accused is properly convicted of the offence of keeping a common bawdy-house contrary to s. 193(1) of the *Criminal Code* where the evidence indicates that he was the owner and directing mind of a corporation which operated a steam-bath found by the trial judge to be a common bawdy-house and that he participated in the management of the premises, received the proceeds from the operation of the business, hired and paid staff and paid other operating expenses out of those proceeds and was aware of the activities being carried on in the premises. In such circumstances there is no requirement that the Crown also establish that the accused participated in the day-to-day running of the premises.

IN THE SUPREME COURT OF ONTARIO

(Action commenced in the County of Frontenac)

BETWEEN:

PERCY WAYNE MITCHELL

Applicant

- AND -

THE CROWN

Respondent

REASONS FOR JUDGMENT

DELIVERED ORALLY BY THE HONOURABLE ALLEN M. LINDEN
on October 21, 1983

APPEARANCES

For the Applicant	Ronald Price, Esquire
For the Crown - Respondent	Brian Everndon, Esquire

This is the continuation of an application brought by Percy Wayne Mitchell for a writ of habeas corpus ad subjiciendum with certiorari in aid, or for relief pursuant to section 24(1) of the Charter of Rights.

I BACKGROUND

The first part of this application was heard on April 12th, 1983. At that time, the applicant invited this Court to find that his continued incarceration pursuant to a sentence of preventive detention violates his rights to be protected against cruel and unusual treatment or punishment, and not to be arbitrarily detained. On July 7th, I held that the continued detention of the applicant violates section 12 of the Charter of Rights, if he is not a danger to society. Accordingly, I ordered that pursuant to section 709 of the Criminal Code, R.S.C. 1970, Chap. C-34, further evidence should be heard for the purpose of determining whether, in fact, the applicant is dangerous. I held that the onus rests upon the applicant to demonstrate to this Court that he is not a danger to society. That onus is on a balance of probabilities. It is up to the applicant to establish circumstances that would lead

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this Court to conclude that to continue to detain him as a habitual criminal for an indeterminate period constitutes cruel and unusual treatment or punishment in violation of section 12 of the Charter.

Although after my ruling of July 7th the Parole Board reviewed the applicant's detention, it once again denied him parole. I am not sitting in review of that decision, nor have I been asked to determine whether the Parole Board has erred in any way.

II THE EVIDENCE

One cannot help but be saddened by the applicant's tale of a largely wasted life. The applicant, who suffers from skin cancer, is sixty-one years old. He has passed the bulk of his adult life incarcerated in various institutions, as a result of convictions for numerous offences. Although most of those offences were of a relatively minor nature, he has also been convicted of some rather serious crimes.

The applicant has spent most of the last fourteen years in prison. Approximately twelve of those years have been served pursuant to a sentence of preventive detention. That sentence was imposed in August of 1970, following a finding that the applicant is a habitual criminal. During those past fourteen

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years, he has been at large for approximately one year in total. He worked for six months during one period of liberty, but committed another offence and was sent back to the institution where he is presently incarcerated.

The evidence discloses that for at least the last sixteen months, the applicant has been a model inmate at the Joyceville Penitentiary. Several persons from the penitentiary staff gave testimony on the applicant's behalf.

Herbert Smith, the inmate induction officer and "employer" of the applicant within the penitentiary, testified that he has complete trust in the applicant. There have been no thefts during Smith's tenure in office, and he has had no cause to reprimand the applicant for his conduct. Smith also testified that the applicant is one of only five inmates out of approximately four hundred and eighty who have been given security clearance passes which permit them to go anywhere within the institution. Smith had nothing negative to say about the applicant.

Joseph Burt, a living-unit officer who looks after the needs of the applicant and seven other inmates, described the applicant as a "model inmate" who has never been menacing to anyone. Burt testified that he would like to have seven more inmates like the applicant.

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Joseph Corrigan, the assistant warden of Joyceville Penitentiary, testified that he is a former "employer" of the applicant within the institution. Corrigan found the applicant to be a dependable worker who could be counted on to do his job. He views the applicant as a stabilizing influence on the other inmates. According to Corrigan, the applicant is not at all violent, and does not appear to use drugs or alcohol, unlike many of the other inmates.

Dr. Robert McCaldon, a psychiatrist who devotes half of his professional career to working with inmates in the various penal institutions in the Kingston area, also testified on the applicant's behalf. In Dr. McCaldon's opinion, the applicant does not satisfy the criteria of dangerousness set out in the present section 688 of the Criminal Code. His opinion was based upon an interview with the applicant and an examination of the record of the applicant's conduct within the penitentiary. Dr. McCaldon indicated that although his forecast that the applicant would not be a danger to society if released could not be relied upon as being one hundred percent certain, his forecasts are accurate about seventy percent of the time. Furthermore, his views are deserving of additional weight because of his experience with inmates of penal institutions.

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The applicant himself took the stand to explain some of his prior conduct. He admitted that as a young man he had a "short fuse" which sometimes resulted in violent behaviour. The applicant further testified, however, that he no longer resorts to violence. He explained that he was once warned by a police officer, following a fight in which he seriously injured another person, that he could end up killing someone if he continued to engage in such conduct. This seems to have left a lasting impression upon him. Dr. McCaldon's testimony confirmed this aspect of the applicant's evidence. Dr. McCaldon testified that the applicant had been exposed to a Dr. Bruno Cormier while he was in an institution in Montreal, and that he appears to have learned from him the foolishness of violence.

The applicant explained that the robbery offences for which he was convicted in the 1940's and 1950's did not involve the use of a weapon. The applicant committed the robberies by putting his hand in his pocket to make it appear that he had a gun. In fact, he was not armed. Since no evidence was called to contradict these assertions, I accept the applicant's version.

The applicant also explained the circumstances surrounding his conviction for assaulting a police officer. In that case, an officer who had not identified himself jumped upon

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the applicant, who claims merely to have defended himself.

Although the applicant also has been convicted of escaping from prison and attempted escape, the applicant's explanation of the circumstances surrounding the commission of these offences satisfies me that no violence was involved.

In general, there is nothing to indicate that the applicant has been violent in any way since 1960. It is clear, however, that he committed several property offences during that period,including one while he was on parole.

III RULING

As I indicated earlier, the original decision to sentence the applicant to preventive detention is not being challenged in this application. Rather, it is the continued detention of the applicant that is under attack.

Weighing all the evidence, I am satisfied that the applicant has demonstrated on a balance of probabilities that he is not dangerous according to the criteria contained in section 688 of the present Criminal Code. Finding, as I do, that there is no indication whatsoever that the applicant has done anything violent during the past twenty-three years, and that there is no danger of him doing violence to anyone in the future, I must conclude that his continued detention is dis-

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proportionate and thus in violation of section 12 of the Charter of Rights. To continue to detain this man, who is no more than a "social nuisance", for more than twelve years surpasses all rational bounds of treatment or punishment, and is so excessive as to outrage standards of decency. Such detention thus violates the applicant's constitutional right not to be subjected to cruel and unusual treatment or punishment.

Accordingly, I hold that the applicant's continued detention is illegal and in contravention of the Charter of Rights. The appropriate remedy is to grant the applications for a writ of habeas corpus, and for relief pursuant to section 24(1) of the Charter, and to order that the applicant be released as soon as the appropriate documents can be prepared and executed, and arrangements have been made for his return to his home in Montreal.

Although costs are sought by the applicant, I am not convinced that this is an appropriate case for making such an order. Normally, costs are not provided in a matter such as this. Although counsel for the applicant has expressed concern that if this matter is appealed by the Crown, the Quebec Legal Aid Plan may not be as helpful as Ontario Legal Aid has been, one hopes that the Crown would make arrangements to ensure that the applicant would continue to be represented, so that this issue would not be finally disposed of by a higher court without the benefit of full argument.

JSCC

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IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE LINDEN	)	FRIDAY, the 21st day of
	)	October, 1983
IN SPECIAL SITTING, AT THE COURT HOUSE, KINGSTON	)	

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM WITH CERTIORARI IN AID THEREOF;

AND IN THE MATTER OF AN APPLICATION FOR A REMEDY UNDER SECTION 24(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS;

AND IN THE MATTER OF PERCY WAYNE MITCHELL, AN INMATE OF JOYCEVILLE INSTITUTION, CORRECTIONAL SERVICE OF CANADA.

ORDER

UPON THE APPLICATION of Percy Wayne Mitchell for a writ of habeas corpus and subjiciendum, with certiorari in aid thereof, with respect to his confinement at the Joyceville Institution, Correctional Service of Canada, pursuant to his continued imprisonment under sentence of preventive detention under the authority of a Mandat d'Emprisonnement signed at Montreal, in the Province of Quebec, by the Greffier de la Paixet de la Couronne, and dated the 25th day of August, 1970, and upon the further application of the said Percy Wayne Mitchell for a remedy under Section 24(1) of the Canadian Charter of Rights and Freedoms, in the presence of Counsel for the Applicant and for the Attorney General of Canada and for the Attorney General of Ontario, and having read the Affidavits filed by and on behalf of the Applicant and the Crown, and having heard the testimony of witnesses called by the parties, and having read the Order made on the 7th day of July, 1983 and entered the 5th day of August, 1983, and upon hearing what was said by Counsel aforesaid, and on consent this motion having been heard as an application for discharge of the prisoner as if the writ had been issued and returned:

1. IT IS ORDERED that the said Percy Wayne Mitchell is no longer subject to preventive detention under the authority of the aforesaid Mandat d'Emprisonnement signed at Montreal, in the Province of Quebec, by the Greffier de la Paixet de la Couronne, and dated the 25th day of August, 1970.

2. **AND IT IS FURTHER ORDERED** that insofar as the said Percy Wayne Mitchell is held in custody pursuant to the said Mandat d'Emprisonnement signed at Montreal, in the Province of Quebec, by the Greffier de la Paixet de la Couronne, and dated the 25th day of August, 1970, he be released therefrom and discharged from custody.

3. **AND IT IS FURTHER ORDERED** that there be no costs of this application.

GIVEN under my hand the seal of the Said Court this 26th day of October, A.D. 1983, at Kingston, Ontario.

tered in Order Book at folio
o. 105 this 26th of October 1983
Maureen Oakes
Local Registrar, S.C. Deputy

M. Maureen Oakes
LOCAL REGISTRAR SCO

Gouvernement
du Canada

RAPPORT
DE LA COMMISSION D'ENQUÊTE SUR LES REPRIS DE JUSTICE AU CANADA

L'HONORABLE JUGE STUART M. LEGGATT

Canada

RAPPORT DE LA
COMMISSION D'ENQUÊTE SUR LES REPRIS DE JUSTICE AU CANADA

LE JUGE STUART M. LEGGATT

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REMERCIEMENTS

La présente étude porte sur les individus qui ont été déclarés repris de justice. Elle a été réalisée sur une période de plus de sept mois et un grand nombre de personnes de diverses régions du pays y ont contribué. La Commission tient à remercier spécialement un certain nombre de personnes avec qui elle a travaillé en étroite collaboration.

Nous tenons d'abord à exprimer notre gratitude au personnel du ministère de la Justice et du ministère du Solliciteur général à Ottawa pour son zèle infatigable et sa constante courtoisie, et notamment à M. Neville Avison du ministère de la Justice ainsi qu'à tous ceux qui, sous sa direction, ont fait preuve d'un dévouement qui ne s'est jamais démenti.

Nous sommes avant tout redevable au professeur Michael Jackson de l'Université de la Colombie-Britannique du travail préliminaire effectué sur le sujet des repris de justice. Il convient de louer les efforts inlassables qu'il a déployés pour obtenir des mesures de clémence dans les cas d'injustice flagrante et pour venir en aide aux individus se trouvant dans des situations malheureuses. M. Jackson a mis son esprit juridique pénétrant et sa sensibilité au service d'un grand nombre de détenus. Il a également contribué à la coordination des travaux du groupe d'avocats de la défense de la Colombie-Britannique.

Nous soulignons également avec reconnaissance l'aide que nous avons reçue de M. David Cole et de Mme Judy Elliot, coordonnateurs respectifs des services d'aide juridique de l'Ontario et du Manitoba.

Nous nous en voudrions d'autre part de passer sous silence l'efficacité et la compétence avec laquelle Mme Sharon Vance a exécuté le travail d'organisation, de préparation de l'horaire et d'administration générale. L'intérêt qu'elle a manifesté depuis longtemps pour la pénologie lui a permis de nous fournir de précieux conseils et de contribuer ainsi à la rédaction du rapport final.

Doreen Gracey, la secrétaire de la Commission, s'est occupée de nos bureaux lors de nos déplacements à l'extérieur de l'Ouest du Canada. Sa bonne humeur et son optimisme constants nous ont été très utiles.

Donald J. Sorochan a quant à lui assumé la lourde tâche de régler les détails des audiences. Il a préparé tous les dossiers des provinces anglophones et s'est acquitté avec brio des fonctions d'avocat de la Commission lors de la plus grande partie des audiences. Il a en outre apporté son concours à la rédaction du rapport final, notamment en ce qui concerne l'historique et la vue d'ensemble des dispositions législatives applicables aux repris de justice et au droit de pardon.

M^e^ Serge Ménard était l'avocat de la Commision pour le Québec. Par les conseils qu'il a fournis et l'énergie considérable qu'il a déployée lors de la préparation des dossiers et du déroulement des audiences, il a joué un rôle capital dans les travaux de la Commission. Plusieurs des cas les plus difficiles que nous avons rencontrés provenaient du Québec et la Commission lui est reconnaissante pour l'aide inestimable qu'il lui a apportée.

Les conseils fournis par nos deux avocats, tant sur le plan pratique que juridique, ont rendu possible la rédaction du présent rapport.

La Commission a été secondée par une équipe de procureurs de la Couronne expérimentés mis à sa disposition par les procureurs généraux des diverses provinces. Il était absolument nécessaire, pour nos audiences, qu'ils examinent les dossiers et qu'ils nous donnent leur opinion sur les individus considérés. Deux procureurs de la Couronne se sont particulièrement distingués en raison du grand nombre de cas qu'ils ont étudiés et de la difficulté de ceux-ci. Il s'agit de M^e^ Colin Sweeney, de Vancouver, et de M^e^ Pierre Sauvé, de Montréal. Nous remercions les procureurs généraux des provinces d'avoir nommé des avocats aussi compétents.

Nous devons également beaucoup au professeur R. Price, c.r., de l'Université Queen's, pour la recherche et les travaux qu'il a effectués sur les problèmes reliés à la législation régissant les repris de justice.

La Commission désire également remercier les juges en chef du Québec, de l'Ontario, du Manitoba, de l'Alberta et de la Colombie-Britannique, qui ont bien voulu nous prêter des locaux pour la tenue de nos audiences.

Finalement, il faut reconnaître qu'il nous aurait été impossible de nous prononcer sur les quatre-vingt-sept cas soumis à notre étude n'eût été de l'aide de la Commission des libérations conditionnelles et du Service national des libérations conditionnelles. Nous avons bénéficié de leur concours du début à la fin; ils nous ont, dans plusieurs dossiers, informés des antécédents de la personne en cause. Il convient à cet égard de mentionner plus particulièrement la collaboration du commissaire principal, Mme Kathy Louis, et du personnel de la Commission des libérations conditionnelles de la Région du Pacifique.

AVANT-PROPOS

M. Stuart M. Leggatt, juge à la Cour de comté de Vancouver, en Colombie-Britannique, a reçu la permission de s'absenter de ses fonctions judiciaires à compter du 1er août 1983 afin de faire enquête sur le cas des repris de justice au Canada. La nomination du juge Leggatt a été faite conjointement par le ministre de la Justice et le solliciteur général du Canada.

Le mandat de la Commission d'enquête sur les repris de justice au Canada était le suivant :

i) faire enquête sur le cas de chacune des quatre-vingt-treize personnes qui sont encore reconnues comme repris de justice en vertu des dispositions législatives abrogées par le Parlement en 1977, afin de déterminer lesquelles d'entre elles ne présentent plus de danger pour la sécurité d'autrui si l'on tient compte des critères et de la philosophie énoncés à la Partie XXI du **Code criminel;**

ii) recommander au ministre de la Justice et au solliciteur général du Canada, à l'égard de chaque repris de justice, s'il y a lieu de remettre sa peine de détention préventive permanente;

iii) et déterminer et recommander au ministre de la Justice et au solliciteur général du Canada le mécanisme le plus approprié et le plus rapide pour effectuer ces remises de peine s'il y a lieu.

La Commission d'enquête se composait des personnes suivantes :

Président : le juge Stuart M. Leggatt

Avocats de la Commission : M. Donald J. Sorochan
Me Serge Ménard

Administratrice : Sharon Vance

Secrétaire de la Commission : Doreen Gracey

Voici, pour chaque province, quels étaient les avocats de la Couronne et ceux des repris de justice:

Colombie-Britannique

Avocat de la Couronne : M. Colin Sweeney

Avocats des délinquants: Le professeur Michael Jackson
Mme Angela Bartram
Mme Judi Gedye
Mme Ann Rounthwaite

Alberta

Avocats de la Couronne : M. Yaroslav Roslak
M. Michael Watson

Avocats des délinquants: M. Peter Hanington
M. Alexander Pringle
M. Peter Royal

Saskatchewan

Avocat de la Couronne : M. Peter Hryhorchuk

Avocats des délinquants: M. Elliot Starer
M. James Crane
M. Gary Moran
M. Stan Loewen

Manitoba

Avocat de la Couronne : M. Robert Gosman

Avocate des délinquants: Mme Judy Elliott

Ontario

Avocat de la Couronne : M. E. Howell

Avocats des délinquants: M. R. Price, c.r.
Mme Charlene Mandell
M. Fergus O'Connor
M. David Cole
M. Robert Bigelow

Québec

Avocat de la Couronne : M. Pierre Sauvé

Avocats des délinquants: Mme Danièle Roy
M. Jean-Paul Perron
M. Allan Guttman
M. Alan Parvu
M. Christian Desrosiers
M. R. La Haye
M. C. Girouard
M. A. Sosna
Mlle Micheline St-Laurent
M. Edward Mattey
Mme Dominique LaRose
M. Franklin Shoofey
Mme Danielle Girard

Nouvelle-Ecosse

Avocat de la Couronne : M. Kenneth Fisk

Avocats du délinquant: M. David Green

AUDIENCES

La Commission d'enquête a tenu quatre-vingt-sept audiences, dans les villes suivantes : Halifax, Montréal, Kingston, Toronto, Winnipeg, Prince-Albert, Edmonton et Vancouver. Les délinquants et les procureurs généraux des provinces étaient tous représentés par un avocat. La Commission avait son propre avocat.

Pour ce qui concerne les trois repris de justice de la Colombie-Britannique qui bénéficiaient d'une levée des obligations de leur libération conditionnelle, la Commission les a entendus dans ses bureaux, en présence seulement de l'avocat de la Commission.

Certaines audiences ont eu lieu à huis clos, lorsque la protection de la vie privée des individus concernés devait l'emporter sur l'intérêt public. Tel était particulièrement le cas des personnes qui s'étaient amendées et s'étaient réinsérées dans la société.

Sauf ces quelques exceptions, les audiences de la Commission ont été publiques. Il n'a pas été jugé opportun d'organiser des réunions où le grand public aurait fait connaître ses vues, étant donné que la mission de la Commission était de se pencher d'abord et avant tout sur les mesures de clémence à prendre à l'égard des détenus concernés, plutôt que de procéder à une étude théorique des dispositions législatives applicables aux repris de justice ou des sentences indéterminées.

La Commission a visité le Centre correctionnel communautaire Robson de Vancouver, ainsi que la maison Cordova, un centre pour alcooliques. Ces deux établissements fournissent de l'hébergement et des programmes à certains repris de justice qui obtiennent leur mise en liberté.

APERÇU DE LA QUESTION

Le plus jeune des repris de justice est André Robillard, maintenant âgé de trente-sept ans. Les plus vieux sont Louis Gallo, Lionell J. Craig et Wesley B. Harnish, tous trois âgés de quatre-vingt-un ans.

Des quatre-vingt-sept individus qui ont fait l'objet de l'enquête, cinquante-six étaient en libération conditionnelle totale, quatre étaient relevés des obligations de leur libération conditionnelle et vingt-sept étaient soit incarcérés, soit placés sous l'autorité des services correctionnels. L'âge moyen actuel des individus ayant fait l'objet de l'enquête est de cinquante-neuf ans, ce qui est beaucoup plus élevé que l'âge moyen du reste de la population carcérale.

Si les recommandations de la Commission d'enquête étaient suivies, soixante-treize des quatre-vingt-sept détenus étudiés seraient immédiatement soustraits à l'autorité des services correctionnels et du Service national des libérations conditionnelles et recouvreraient leur pleine liberté.

Des vingt-sept individus qui étaient incarcérés ou qui relevaient des services correctionnels au moment des audiences, quinze seraient mis en liberté.

CONCLUSIONS

La plupart des individus dont nous avons examiné le cas peuvent être considérés tout au plus comme des éléments sociaux fortement perturbateurs. Ils n'ont jamais été tenus pour dangereux. Bon nombre des individus étudiés ont fait valoir que leur peine en était en réalité une d'emprisonnement à perpétuité, et qu'ils avaient vu des individus condamnés pour meurtre être élargis alors qu'eux-mêmes restaient en détention. Cela a suscité chez plusieurs d'entre eux un profond sentiment d'amertume et rend la tâche des services correctionnels d'autant plus difficile.

Dans bien des cas, ce n'est pas la commission de nouvelles infractions qui expliquait l'incarcération ou la réincarcération du repris de justice, mais plutôt son défaut de se conformer à des obligations qui ne sont pas de nature pénale, comme s'abstenir d'alcool.

Nous avons constaté que l'abus de l'alcool ou de la drogue, quand ce n'était pas les deux à la fois, avait joué un grand rôle dans les activités criminelles d'au moins cinquante-trois des sujets. Il a été prouvé devant la Commission que l'alcool et la drogue sont des facteurs qui entraient en cause dans les crimes commis par 61 % de ceux qui ont été déclarés repris de justice (17 % des crimes étaient attribuables à la toxicomanie et 44 % à l'alcoolisme). Les études montrent que le total du temps passé en prison par les détenus pour des infractions liées à l'alcool dépasse celui qui est attribuable aux infractions de vol, de possession de biens criminellement obtenus et d'introduction par effraction mises ensemble. Le nombre de ceux que leur alcoolisme a indirectement conduit au crime et à la déchéance est renversant.

Il est en outre évident que, dans de nombreux cas, il existe un lien direct entre, d'une part, la durée de la détention et, d'autre part, la révolte et l'agressivité du détenu envers l'autorité et la surveillance. En tout état de cause, j'en suis venu à la conclusion que la durée de la période d'incarcération de bon nombre de ceux qui ont été déclarés repris de justice est disproportionnée au mal ou aux dommages qu'ils ont commis, de même qu'à leur risque de récidive.

Il nous faut également rappeler que les dispositions sur les repris de justice, comme l'a déjà noté le rapport Ouimet, ont été appliquées de façon arbitraire au Canada. Cela a provoqué le ressentiment des détenus en cause et a créé chez eux un sentiment de méfiance envers un système qu'ils considèrent comme injuste.

Il apparaît également que l'aspect punitif des dispositions sur les repris de justice a dépassé les prévisions même de ceux qui en ont requis l'application.

RÉHABILITATION

Seulement onze des quatre-vingt-sept repris de justice n'ont pas commis d'autres infractions depuis leur condamnation à l'emprisonnement pour une période indéterminée. Cela tendrait à démontrer que la valeur dissuasive de ce genre de peine est limitée. En fait, cela a même contribué à rendre certains sujets déjà opposés à l'autorité encore plus amers et déterminés à vivre leur vie comme mésadaptés sociaux, ce qui les rend d'autant plus susceptibles de continuer à mener une existence criminelle une fois remis en liberté. Le seul effet que nous ayons pu constater, pour ce qui concerne la réhabilitation, est que les détenus perdent de leur vigueur avec l'âge et qu'il vient un temps, où l'effort qu'exige un crime est tout simplement trop lourd.

L'étude révèle que d'autres raisons peuvent expliquer les changements intervenus dans le comportement criminel des intéressés. Assurément, la rencontre d'un partenaire en mesure de combler les attentes du criminel et capable de l'inciter et de l'aider à changer de mode de vie constitue un facteur clé dans plusieurs des cas étudiés. Il va également sans dire que, dans les cas où le comportement criminel est lié à l'alcool ou à la drogue, la réussite d'un traitement s'est avérée un facteur déterminant.

Il convient maintenant de se demander si les sentences indéterminées ont permis d'atteindre l'objectif fondamental que représente la protection du public. Il est impossible de savoir avec certitude si le public aurait été aussi bien protégé par une peine à durée déterminée que par une peine à durée indéterminée. Le problème des peines à durée indéterminée est qu'il existe souvent une différence marquée entre le comportement en institution et la conduite à l'extérieur. En d'autres mots, le détenu peut se comporter très bien en institution tout en demeurant un danger pour autrui dès qu'il en sort, et vice versa. Or, le comportement en détention n'en demeure pas moins l'un des principaux critères pris en considération au moment d'accorder la libération conditionnelle.

Le problème de la différence de comportement se pose avec encore plus d'acuité chez le détenu qui exécute une peine à durée indéterminée. À cause des peines antérieures, celui-ci a déjà séjourné en prison; ce fait, et la perspective de se voir infliger une peine d'emprisonnement à perpétuité, diminue ses chances de réussite en libération conditionnelle. Pourtant, la libération conditionnelle représente le seul espoir auquel le repris de justice peut se raccrocher. Je suis d'avis que le processus normal d'admissibilité à la libération conditionnelle et les peines à durée déterminée sont plus susceptibles d'assurer la protection du public en même temps que la réhabilitation du criminel.

Quoique le châtiment ait un effet dissuasif chez certaines personnes et à l'égard de certains crimes, il ne semble pas exister de relation de cause à effet dans le cas des repris de justice. Une chose est sûre : les antécédents des détenus étudiés montrent que le châtiment ne les a pas dissuadés de commettre d'autres crimes. Il ne semble pas exister de preuve concluante établissant que le fait d'augmenter la sévérité du châtiment au moyen d'une peine de durée indéterminée ait eu pour effet de réduire leurs penchants criminels.

PRÉVOIR LA DANGEROSITÉ

Le mandat de la Commission consistait notamment à "déterminer lesquelles d'entre elles (les quatre-vingt-treize personnes qui sont encore reconnues comme repris de justice) ne présentent plus de danger pour la sécurité d'autrui si l'on tient compte des critères et de la philosophie énoncés à la Partie XXI du **Code criminel**". Cela nous oblige à aborder le difficile problème de la prévision de la dangerosité.

La Commission fait siennes les conclusions du rapport du Centre de criminologie de l'Université de Toronto intitulé : La détermination de l'état dangereux : Pour une nouvelle politique à l'égard des délinquants dangereux. Ce rapport fait ressortir l'inutilité d'essayer de prévoir la dangerosité à partir des examens psychiatriques. La conclusion à laquelle les auteurs du rapport en sont venus est que la meilleure façon de pronostiquer la dangerosité est d'examiner les antécédents et le casier judiciaire de l'individu. Nous croyons qu'avec l'effet modérateur du vieillissement, cela constitue le meilleur critère pour déterminer la dangerosité future de l'intéressé. L'âge du sujet joue en faveur du détenu dans la plupart des cas, de même que le temps écoulé depuis la dernière infraction criminelle comportant un élément ou une possibilité de violence. Les actes de brutalité associés à la perpétration des infractions ont aussi considérablement influencé nos conclusions.

MESURES DE CLÉMENCE

Les détenus que nous avons étudiés se classent en trois catégories. La première catégorie regroupe ceux qui ne sauraient pour l'instant être déclarés délinquants dangereux et qui ne présentent pas de risque pour la sécurité d'autrui selon les principes et critères énoncés à la Partie XXI du **Code criminel.** Soixante-treize personnes font partie de cette catégorie.

La deuxième catégorie comprend ceux dont le casier judiciaire ne permet pas de les faire déclarer délinquants dangereux sous le régime de la Partie XXI du **Code criminel,** mais qui présentent un danger pour la sécurité d'autrui. Cette catégorie comprend neuf personnes.

La troisième catégorie est constituée des individus qui sont susceptibles d'être déclarés dangereux et qui présentent un risque pour la sécurité d'autrui sur la base des critères et principes définis à la Partie XXI du **Code criminel.** Cinq personnes sont dans ce cas.

On a étudié la possibilité d'utiliser le pardon conditionnel révocable en cas de violation des obligations imposées. Cette solution a toutefois été rejetée parce qu'elle équivaudrait à réintroduire une notion qui a été supprimée du **Code criminel,** celle de repris de justice. Cela nécessiterait en outre une forme spéciale de surveillance qui, eu égard aux antécédents des individus concernés, ne saurait convenir.

Nous recommandons la remise en liberté automatique et immédiate des détenus dès l'expiration de la période prévue, à condition que, au cours de la période fixée, ils ne soient pas condamnés pour sévices graves à la personne, au sens que la Partie XXI du **Code criminel** donne à cette expression, et qu'aucune poursuite pour de tels sévices ne soit en cours. À l'égard de huit des quatre-vingt-sept sujets étudiés, il est recommandé de ne prendre des mesures de clémence qu'après l'expiration de la période précisée.

APRÈS LA LIBÉRATION

Il faudra répondre aux besoins particuliers de certains individus. À cet égard, nous avons formulé un certain nombre de recommandations précises. D'une manière générale, je recommande d'octroyer les crédits nécessaires à cette fin par l'entremise du ministère du Solliciteur général et de confier à une équipe de personnes qualifiées des services correctionnels le soin d'assurer la coordination des mesures d'aide aux repris de justice libérés.

Je ne vois pas la nécessité de recommander en l'occurrence la création d'établissements de traitement spécialisés. Cette aide peut être fournie par les organismes déjà existants, comme la John Howard Society et les Alcooliques Anonymes.

CHAPITRE I

VUE D'ENSEMBLE DE LA QUESTION

Le Canada a mis en place en 1947 des dispositions législatives visant les repris de justice [1]. Ces dispositions se retrouvaient à l'ancienne Partie X(A) du **Code criminel** et s'inspiraient largement du **Prevention of Crime Act, 1908** (U.K.) c. 59, art. 10 à 16. Les nouvelles dispositions canadiennes étaient ainsi conçues :

> "575A. Dans la présente Partie, à moins que le contexte ne s'y oppose, l'expression "juge" désigne un juge agissant sous le régime de la Partie XVIII de la présente loi et tout juge ayant juridiction au criminel dans la province.
>
> 575B. Lorsqu'une personne est déclarée coupable d'un acte criminel commis après l'entrée en vigueur de la présente Partie et que, subséquemment, le délinquant admet qu'il est repris de justice ou est reconnu repris de justice par un jury ou un juge, et que la cour prononce une sentence contre ledit délinquant, la cour, si elle estime, en raison des habitudes et manière de vivre criminelles de l'individu, que la chose est opportune pour la protection du public, peut prononcer une sentence supplémentaire ordonnant que cet individu soit détenu dans une prison pour une période indéterminée. Cette détention est ci-après appelée détention préventive, et la personne visée par une telle sentence est réputée, aux fins de la présente Partie, un repris de justice.
>
> 575C. (1) Une personne ne doit être reconnue repris de justice que si le juge ou le jury, selon le cas, constate, sur preuve,

a) Que, depuis l'âge de dix-huit ans, elle a, au moins trois fois antérieurement à la condamnation du délit imputé dans l'acte d'accusation, été déclarée coupable d'un acte criminel pour lequel elle était passible d'au moins cinq ans d'emprisonnement (qu'une telle condamnation antérieure ait eu lieu avant ou après l'entrée en vigueur de la présente Partie) et qu'elle mène continûment une vie criminelle; ou

b) Qu'elle a, sur une précédente déclaration de culpabilité, été reconnue repris de justice et condamnée à la détention préventive.

(2) Dans tout acte d'accusation prévu par le présent article, il suffit, après avoir imputé le crime, de déclarer que le délinquant est un repris de justice.

(3) Dans les procédures sur l'acte d'accusation, le délinquant n'est en premier lieu inculpé que de la partie de l'acte d'accusation qui impute le délit et si, sur interpellation **(arraignment)**, il plaide coupable ou est déclaré coupable par le juge ou le jury, selon le cas, à moins qu'il ne plaide ensuite coupable d'être un repris de justice, le juge ou le jury est chargé de rechercher si le délinquant est un repris de justice ou non et, dans ce cas, il ne sera pas nécessaire d'assermenter le jury de nouveau.

(4) Nul ne sera jugé sur l'accusation d'être un repris de justice, sauf

a) Si le procureur général de la province où l'accusé doit être jugé y consent; et

b) Si un avis d'au moins sept jours a été donné par le fonctionnaire compétent de la cour par laquelle le délinquant doit être jugé, et l'avis au délinquant doit spécifier les condamnations antérieures et les autres motifs sur lesquels on a l'intention d'établir l'accusation.

575D. Sans préjudice du droit pour l'accusé de présenter une preuve concernant sa réputation, une preuve de ce genre peut, si la cour l'estime utile, être admise sur la question de savoir si l'accusé mène ou ne mène pas continûment une vie criminelle.

575E. Une personne déclarée coupable et condamnée à la détention préventive peut appeler de sa condamnation et sentence, et les dispositions de la présente loi visant un appel d'une condamnation pour un acte criminel y sont applicables.

575F. Lorsqu'une personne a été condamnée, avant ou après l'entrée en vigueur de la présente Partie, à cinq ans ou plus d'emprisonnement et a été condamnée à une détention préventive en vertu de la présente Partie, la Couronne peut, en tout temps, commuer la totalité ou quelque partie du reste de la sentence en une sentence de détention préventive visée par la présente Partie.

575G.(1) La sentence de détention préventive prend effet dès la condamnation d'une personne sur l'accusation d'être un repris de justice.

(2) Les personnes qui purgent une détention préventive peuvent être enfermées dans une prison ou partie de prison réservée à cette fin.

(3) Les personnes qui purgent une détention préventive sont assujetties aux mesures de discipline et de réforme que peuvent prescrire les règlements de la prison.

> 575H. Le ministre de la Justice doit, au moins une fois tous les trois ans durant lesquels une personne est mise sous garde en vertu d'une sentence de détention préventive, examiner l'état de santé, les antécédents et la situation de cette personne en vue de décider si elle devrait être libérée moyennant permis, et à quelles conditions, le cas échéant."

Le nouveau texte de loi prévoyait la détention préventive des repris de justice. En 1948, l'ancien article 1054A du **Code criminel** était adopté [2]. Cet article permettait la détention préventive des délinquants atteints de psychopathie sexuelle criminelle. Des modifications apportées par la suite à la loi ont modifié les dispositions applicables aux repris de justice et aux délinquants atteints de psychopathie sexuelle criminelle. Ces modifications ont regroupé ces dispositions en une même partie du **Code** et y ont apporté quelques changements de fond.

Ainsi, à l'origine, l'article 575C faisait du jury le juge des faits sur la question de savoir si l'accusé devait être reconnu repris de justice. Des modifications ultérieures sont cependant venues réserver à un tribunal sans jury l'audition de la demande de détention préventive des repris de justice [3].

Les dispositions applicables aux repris de justice et celles applicables aux délinquants atteints de psychopathie sexuelle criminelle ont été réunies dans la Partie XXI du **Code criminel.** L'appellation des auteurs d'attentats sexuels soumis à la détention préventive a été changée pour celle de "délinquants sexuels dangereux". La Partie XXI du **Code criminel** a continué de prévoir la détention préventive des repris de justice et des délinquants sexuels dangereux en ses articles 687 à 695, jusqu'à l'abrogation de ces dispositions par les articles de la **Loi de 1977 modifiant le droit pénal** applicables aux délinquants dangereux [4]. La **Loi de 1977 modifiant le droit pénal** prévoit la détention préventive des délinquants dangereux. Elle est entrée en vigueur le 16 octobre 1977.

L'ancienne Partie XXI du **Code criminel** prévoyait ce qui suit au moment de son abrogation:

> "PARTIE XXI
> DÉTENTION PRÉVENTIVE
>
> Interprétation
>
> Définitions - "Cour" - "délinquant sexuel dangereux" - "détention préventive".
>
> 687. Dans la présente Partie "cour" signifie
>
> a) une cour supérieure de juridiction criminelle, ou
>
> b) une cour de juridiction criminelle;
>
> "délinquant sexuel dangereux" désigne un individu qui, d'après sa conduite en matière sexuelle, a manifesté une impuissance à maîtriser ses impulsions sexuelles et qui causera vraisemblablement une lésion corporelle, une douleur ou un autre mal à quelqu'un, à cause de son impuissance à maîtriser à l'avenir ses impulsions sexuelles;
>
> "détention préventive" désigne la détention dans un pénitencier pour une période indéterminée. 1953-54, c. 51, art. 659; 1960-61, c. 43, art. 32; 1968-69, c. 38, art. 76.

Repris de Justice

Demande de détention préventive - Qui est repris de justice.

688. (1) Lorsqu'un accusé a été déclaré coupable d'un acte criminel, la cour peut, sur demande, imposer une sentence de détention préventive au lieu de toute autre sentence qui pourrait être infligée pour l'infraction dont il a été déclaré coupable ou qui a été imposée pour une telle infraction, ou en sus de toute sentence qui a été imposée pour cette infraction au cas où la sentence aurait pris fin,

a) si l'accusé est reconnu repris de justice, et

b) si la cour estime que, l'accusé étant un repris de justice, il est opportun pour la protection du public de le condamner à la détention préventive.

(2) Aux fins du paragraphe (1), un accusé est un repris de justice,

a) si, depuis qu'il a atteint l'âge de dix-huit ans, il a antérieurement, dans au moins trois occasions distinctes et indépendantes, été déclaré coupable d'un acte criminel pour lequel il était passible d'un emprisonnement de cinq ans ou plus et qu'il persiste à mener une vie criminelle, ou

b) s'il a antérieurement été condamné à la détention préventive. 1953-54, c. 51, art. 660; 1960-61, c. 43, art. 33; 1968-69, c. 38, art. 77.

Délinquants sexuels dangereux

Preuve d'une infraction de nature sexuelle - Témoignages de psychiatres - Condamnation à la détention préventive.

689. (1) Lorsqu'un accusé a été déclaré coupable

a) d'une infraction visée par l'article 144, 146, 149, 155, 156 ou 157; ou

b) d'une tentative de commettre une infraction prévue par une disposition mentionnée à l'alinéa a),

la cour doit, sur demande, entendre des témoignages sur la question de savoir si l'accusé est un délinquant sexuel dangereux.

(2) À l'audition d'une demande prévue par le paragraphe (1), la cour doit entendre tout témoignage pertinent et doit entendre les témoignages d'au moins deux psychiatres, dont l'un doit être nommé par le procureur général.

(3) Lorsque la cour juge que l'accusé est un délinquant sexuel dangereux, elle doit, nonobstant les dispositions de la présente loi ou de toute autre loi du Parlement du Canada, lui imposer une sentence de détention préventive au lieu de toute autre sentence qui pourrait être infligée pour l'infraction dont il a été déclaré coupable ou qui a été imposée pour une telle infraction, ou en sus de toute sentence qui a été imposée pour cette infraction si la sentence a pris fin. 1960-61, c. 43, art. 34; 1968-69, c. 38, art. 78.

Dispositions générales

Avis de la demande - Audition de la demande - Quand la preuve n'est pas nécessaire - Lorsque la demande n'a pas été entendue avant la sentence - Preuve d'une nomination.

690.(1) Les prescriptions suivantes s'appliquent à l'égard des demandes prévues par la présente Partie, savoir :

a) une demande selon le paragraphe 688(1) ne doit pas être entendue à moins

(i) que le procureur général de la province où l'accusé doit être jugé n'y consente,

(ii) que le poursuivant, avant ou après la déclaration de culpabilité ou la sentence mais dans les trois mois du prononcé de la sentence et avant que la sentence ait pris fin, n'ait donné à l'accusé un avis de sept jours francs, indiquant les déclarations antérieures de culpabilité et les autres circonstances, s'il en est, sur lesquelles devra s'appuyer la demande, et

(iii) qu'une copie de l'avis n'ait été produite au bureau du greffier de la cour ou du magistrat, selon le cas; et

b) une demande selon le paragraphe 689(1) ne peut pas être entendue, à moins que le poursuivant, avant ou après la déclaration de culpabilité ou la sentence mais dans les trois mois du prononcé de la sentence et avant que la sentence ait pris fin, n'en ait donné à l'accusé un avis de sept jours francs et que copie de l'avis n'ait été produite au bureau du greffier de la cour ou du magistrat, lorsque ce dernier agit sous l'autorité de la Partie XVI.

(2) Une demande prévue par la présente Partie doit être entendue et décidée par la cour sans jury.

(3) Aux fins de l'article 688, lorsque l'accusé admet les allégations contenues dans l'avis mentionné à l'alinéa (1)a), il n'est pas nécessaire de prouver ces allégations.

(4) Lorsqu'une demande prévue au paragraphe 689(1) n'a pas été entendue avant que l'accusé ait été condamné pour l'infraction dont il a été déclaré coupable, la demande ne doit pas être entendue par le juge ou le magistrat qui a condamné l'accusé, mais elle peut être entendue par un autre juge ou magistrat qui aurait pu tenir la même cour ou y siéger.

(5) La production d'un document présenté comme renfermant toute nomination ou tout consentement, que peut faire ou donner le procureur général sous le régime de la présente Partie et comme étant signé par le procureur général constitue, en l'absence de toute preuve contraire, une preuve de cette nomination ou de ce consentement. 1959, c. 41, art. 30; 1960-61, c. 43, art. 35; 1968-69, c. 38, art. 92.

Présence de l'accusé à l'audition de la demande - Exception.

691.(1) L'accusé sera présent à l'audition de la demande en vertu de la présente Partie et, à l'époque où la demande doit être entendue,

a) s'il est enfermé dans une prison, la cour peut ordonner, par écrit, à la personne ayant la garde de l'accusé, de le faire comparaître devant la cour; ou

b) s'il n'est pas enfermé dans une prison, la cour doit émettre une sommation ou un mandat pour enjoindre à l'accusé d'être présent devant la cour, et les dispositions de la Partie XIV concernant la sommation et le mandat s'appliquent **mutatis mutandis**.

(2) Nonobstant le paragraphe (1), la cour peut

a) faire emmener l'accusé et le faire exclure de la cour, s'il se conduit mal en interrompant les procédures de telle sorte qu'il ne serait pas possible de continuer les procédures en sa présence; ou

b) permettre à l'accusé d'être absent de la cour pendant la totalité ou une partie de l'audition, aux conditions que la cour estime à propos. 1968-69, c. 38, art. 79.

Preuve de réputation

692. Sans préjudice du droit pour l'accusé de présenter une preuve concernant sa réputation, un preuve de ce genre peut, si la cour l'estime convenable, être admise sur la question de savoir si l'accusé persiste ou non à mener une vie criminelle ou est ou n'est pas un délinquant sexuel dangereux, selon le cas. 1960-61, c. 43, art. 36.

Prison réservée à cette fin

693. Un accusé condamné à la détention préventive peut être enfermé dans un pénitencier ou une partie d'un pénitencier réservée à cette fin et il est assujetti aux mesures de discipline et de réforme que la loi peut prescrire. 1953-54, c. 51, art. 665; 1960-61, c. 43, art. 38.

Révision par la Commission nationale des libérations conditionnelles

694. Lorsqu'une personne est sous garde en vertu d'une sentence de détention préventive, la Commission nationale des libérations conditionnelles doit, au moins une fois par année, examiner l'état de santé, les antécédents et la situation de cette personne en vue de décider si on devrait lui accorder la libération conditionnelle en vertu de

la **Loi sur la libération conditionnelle de détenus**, et dans l'affirmative, à quelles conditions. 1958, c. 38, art. 24(5); 1960-61, c. 43, art. 39; 1966-67, c. 25, art. 45.

Appel - Appel par le procureur général - Jugement sur l'appel - Idem - Effet du jugement - La Partie XVIII s'applique aux appels.

695.(1) Une personne condamnée à la détention préventive sous l'autorité de la présente Partie peut interjeter appel d'une telle condamnation à la cour d'appel sur toute question de droit ou de fait ou toute question mixte de droit et de fait.

(2) Le procureur général peut interjeter appel, à la cour d'appel, du rejet d'une demande d'ordonnance ressortissant à la présente Partie sur toute question de droit.

(3) Sur un appel d'une sentence de détention préventive, la cour d'appel peut

a) casser cette sentence et imposer toute sentence qui aurait pu être imposée pour l'infraction dont l'appelant a été déclaré coupable, ou ordonner une nouvelle audition; ou

b) rejeter l'appel.

(4) Sur un appel du rejet d'une demande d'ordonnance aux termes de la présente Partie, la cour d'appel peut

a) admettre l'appel, annuler toute sentence imposée à l'égard de l'infraction pour laquelle l'intimé a été déclaré coupable et imposer une sentence de détention préventive, ou ordonner une nouvelle audition; ou

b) rejeter l'appel.

(5) Un jugement de la cour d'appel imposant une sentence en conformité du présent article a la même vigueur et le même effet que s'il s'agissait d'une sentence prononcée par la cour de première instance.

(6) Les dispositions de la Partie XVIII relatives à la procédure sur appels s'appliquent, **mutatis mutandis**, aux appels prévus par le présent article. 1953-54, c. 51, art. 667; 1960-61, c. 43, art. 40; 1968-69, c. 38, art. 80."

La nouvelle Partie XXI du **Code criminel** instituée par la **Loi de 1977 modifiant le droit pénal** ne prévoit plus la détention préventive des repris de justice, mais plutôt la détention préventive des criminels reconnus dangereux conformément aux critères qu'elle énonce. Cette Partie XXI prévoit ce qui suit :

"PARTIE XXI
DÉLINQUANTS DANGEREUX

Interprétation

687. Dans la présente Partie,

"cour" signifie la cour qui a condamné le délinquant qui fait l'objet d'une demande en vertu de la présente Partie ou une cour supérieure de juridiction criminelle;

"sévices graves à la personne" désigne

a) les infractions (la haute trahison, la trahison, le meurtre au premier degré ou au deuxième degré exceptés) punissables, par voie de mise en accusation, d'une peine d'emprisonnement d'au moins dix ans et impliquant

(i) l'emploi, ou une tentative d'emploi, de la violence contre une autre personne, ou

(ii) une conduite dangereuse, ou susceptible de l'être, pour la vie ou la sécurité d'une autre personne ou une conduite ayant infligé, ou susceptible d'infliger, des dommages psychologiques graves à une autre personne, ou

b) les infractions prévues aux articles 144 (viol) ou 145 (tentative de viol), les infractions ou tentatives de perpétration de l'une des infractions prévues aux articles 146 (rapports sexuels avec une personne du sexe féminin âgée de moins de quatorze ans ou de plus de quatorze ans mais de moins de seize ans), 149 (attentat à la pudeur d'une personne du sexe féminin), 156 (attentat à la pudeur d'une personne du sexe masculin) ou 157 (grossière indécence).

Délinquants dangereux

688. Sur demande faite, en vertu de la présente Partie, postérieurement à la déclaration de culpabilité mais avant le prononcé de la sentence, la cour, convaincue que

a) l'infraction commise, constitue un sévice grave à la personne, aux termes de l'alinéa a) de la définition de cette expression à l'article 687, et que le délinquant qui l'a commise constitue un danger pour la vie, la sécurité ou le bien-être physique ou mental de qui que ce soit, en vertu de preuves établissant

(i) que, par la répétition de ses actes, notamment celui qui est à l'origine de l'infraction dont il est déclaré coupable, le délinquant démontre qu'il est incapable de contrôler ses actes et permet de croire qu'il causera vraisemblablement la mort de quelque autre personne, ou causera des sévices ou des dommages psychologiques graves à d'autres personnes,

(ii) que, par la répétition continuelle de ses actes d'agression, notamment celui qui est à l'origine de l'infraction dont il est déclaré coupable, le délinquant démontre une indifférence marquée quant aux conséquences raisonnablement prévisibles que ses actes peuvent avoir sur autrui, ou

(iii) un comportement, chez ce délinquant, associé à la perpétration de l'infraction dont il vient d'être déclaré coupable, d'une nature si brutale que l'on ne peut s'empêcher de conclure qu'il y a peu de chance pour qu'à l'avenir ce comportement soit inhibé par les normes ordinaires de restriction du comportement, ou

b) l'infraction perpétrée constitue un sévice grave à la personne, au terme de l'alinéa b) de la définition de cette expression à l'article 687, et que la conduite antérieure du délinquant dans le domaine sexuel, y compris lors de la perpétration de l'infraction dont il a été déclaré coupable, démontre son incapacité à contrôler ses impulsions sexuelles et laisse prévoir que vraisemblablement il causera à l'avenir de ce fait des sévices ou autres maux à d'autres personnes,

peut déclarer qu'il s'agit là d'un délinquant dangereux et lui imposer, au lieu de toute autre peine qui pourrait être infligée pour l'infraction dont il vient d'être déclaré coupable, une peine de détention dans un pénitencier pour une période indéterminée.

689. (1) La cour ne doit entendre et statuer sur une demande faite en vertu de la présente Partie que si

a) le procureur général de la province ou le délinquant a été jugé soit avant ou après la présentation de la demande, y a consenti;

b) la poursuite a donné au délinquant un préavis d'au moins sept jours francs après la présentation de la demande indiquant ce sur quoi la demande se fonde; et

c) une copie de l'avis a été déposée auprès du greffier de la cour ou du magistrat.

(2) La demande faite en vertu de la présente Partie est entendue et décidée par la cour en l'absence du jury.

(3) Aux fins d'une demande faite en vertu de la présente Partie, lorsqu'un délinquant admet des allégations figurant à l'avis mentionné à l'alinéa (1)b), il n'est pas nécessaire d'en faire la preuve.

(4) La production d'un document contenant apparemment une nomination que peut faire, ou un consentement que peut donner, le procureur général en vertu de la présente Partie, et apparemment signé par le procureur général fait preuve, en l'absence de preuve contraire, de cette

nomination ou de ce consentement sans qu'il soit nécessaire de prouver la signature ou la qualité officielle de la personne l'ayant apparemment signé.

690. (1) Lors de l'audition d'une demande en vertu de la présente Partie, la cour doit entendre la preuve d'au moins deux psychiatres et toute autre preuve qu'elle considère pertinente y compris la preuve de tout psychologue ou criminologue appelé comme témoin par la poursuite ou par le délinquant.

(2) L'un des psychiatres mentionnés au paragraphe (1) est nommé par la poursuite et l'autre par le délinquant.

(3) La cour qui entend la demande nomme un psychiatre aux lieu et place du délinquant qui omet ou refuse de le faire conformément au présent article.

(4) Le présent article ne peut s'interpréter comme augmentant le nombre des experts susceptibles d'être appelés comme témoins sans l'autorisation de la cour ou du juge conformément à l'article 7 de la **Loi sur la preuve au Canada**.

691. (1) La cour à qui une demande est faite en vertu de la présente Partie peut, dans une ordonnance par écrit,

a) ordonner au délinquant que vise la demande de se présenter pour observation devant la personne et aux lieu et date indiqués, ou

b) renvoyer le délinquant à la garde qu'elle prescrit pour observation pendant trente jours au plus,

lorsque, suivant son opinion appuyée par le témoignage, ou lorsque le poursuivant et cette personne y consentent, par le rapport écrit d'au moins un médecin dûment qualifié, il y a des motifs de croire qu'il serait possible d'obtenir par suite de cette observation, des preuves pouvant s'avérer utiles à l'examen d'une telle demande.

(2) Par dérogation au paragraphe (1), la cour à qui une demande est faite en vertu de la présente Partie peut renvoyer la personne que vise cette demande conformément à ce paragraphe,

a) pour une période d'au plus trente jours sans avoir entendu le témoignage ou examiné le rapport d'un médecin dûment qualifié, lorsque les circonstances l'exigent et qu'il ne se trouve pas de médecin qui puisse à bref délai examiner cette personne et rendre témoignage ou présenter un rapport; et

b) pour une période de plus de trente jours ne dépassant pas soixante jours, lorsqu'elle est convaincue qu'une telle période d'observation est requise compte tenu de toutes les circonstances de l'affaire et que son opinion est appuyée par le témoignage ou, lorsque le poursuivant ou cette personne y consentent, par le rapport écrit d'au moins un médecin dûment qualifié.

692. Sans préjudice du droit pour le délinquant de présenter une preuve concernant son caractère ou sa réputation, une preuve de ce genre peut, si la cour l'estime opportun, être admise sur la question de savoir si le délinquant est ou non un délinquant dangereux.

693. (1) Le délinquant doit être présent à l'audition de la demande en vertu de la présente Partie et, à l'époque où la demande doit être entendue,

a) s'il est enfermé dans une prison, la cour peut ordonner, par écrit, à la personne ayant la garde de l'accusé, de le faire comparaître devant la cour; ou

b) s'il n'est pas enfermé dans une prison, la cour doit émettre une sommation ou un mandat pour enjoindre l'accusé d'être présent devant la cour et les dispositions de la Partie XIV concernant la sommation et le mandat s'appliquent **mutatis mutandis.**

(2) Nonobstant le paragraphe (1), la cour peut

a) faire expulser le délinquant, s'il se conduit mal en interrompant les procédures de telle sorte qu'il ne serait pas possible de continuer les procédures en sa présence; ou

b) permettre au délinquant d'être absent de la cour pendant la totalité ou une partie de l'audition, aux conditions que la cour estime à propos.

694. (1) Les personnes condamnées à la détention dans un pénitencier pour une période indéterminée sous l'autorité de la présente Partie peuvent interjeter appel d'une telle condamnation à la cour d'appel sur toute question de droit ou de fait ou toute question mixte de droit et de fait.

(2) Le procureur général peut interjeter appel, à la cour d'appel, du rejet d'une demande d'ordonnance en vertu de la présente Partie sur toute question de droit.

(3) Sur un appel d'une sentence de détention dans un pénitencier pour une période indéterminée, la cour d'appel peut

a) casser cette sentence et imposer toute sentence qui aurait pu être imposée pour l'infraction dont l'appelant a été déclaré coupable, ou ordonner une nouvelle audition; ou

b) rejeter l'appel.

(4) Sur un appel du rejet d'une demande d'ordonnance aux termes de la présente Partie, la cour d'appel peut

a) admettre l'appel, annuler toute sentence imposée à l'égard de l'infraction pour laquelle l'intimé a été déclaré coupable et imposer une sentence de détention dans un pénitencier pour une période indéterminée, ou ordonner une nouvelle audition; ou

b) rejeter l'appel.

(5) Le jugement de la cour d'appel imposant une sentence en conformité du présent article a la même vigueur et le même effet que s'il s'agissait d'une sentence prononcée par la cour de première instance.

(6) Par dérogation au paragraphe 649(1), la sentence que la cour d'appel impose à un délinquant en conformité du présent article est réputée avoir commencé lorsque le délinquant a été condamné par la cour qui l'a déclaré coupable.

(7) Les dispositions de la Partie XVIII relatives à la procédure sur appels s'appliquent, **mutatis mutandis**, aux appels prévus par le présent article.

695. La cour qui, conformément à l'article 688, déclare qu'un délinquant est dangereux et qui le condamne à une peine de détention dans un pénitencier pour une période indéterminée doit ordonner que soit remis au solliciteur général du Canada, à titre d'information, avec les notes sténographiques du procès, copie des rapports et témoignages des psychiatres, psychologues ou criminologues, ainsi que des observations faites par la cour, portant sur les motifs de la sentence.

> 695.1 (1) Sous réserve du paragraphe (2), la Commission nationale des libérations conditionnelles doit examiner les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée dès l'expiration d'un délai de trois ans à compter du jour où ces personnes ont été mises sous garde et, par la suite, tous les deux ans au plus tard, afin d'établir s'il y a lieu de les libérer conformément à la **Loi sur la libération conditionnelle de détenus** et, dans l'affirmative, à quelles conditions.
>
> (2) La Commission nationale des libérations conditionnelles doit, au moins une fois par an, examiner les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée imposée avant l'entrée en vigueur de la **Loi de 1977 modifiant le droit pénal** afin d'établir s'il y a lieu de les libérer conformément à la **Loi sur la libération conditionnelle de détenus** et, dans l'affirmative, à quelles conditions."

Au cours des trente-trois années d'existence des dispositions sur les repris de justice, cent soixante-treize personnes ont été déclarées repris de justice et condamnées à la détention préventive. Le tableau 1 donne le nombre de repris de justice, par région et par décennie, de 1948 à 1976.

Lors de l'entrée en vigueur des dispositions législatives sur les délinquants dangereux, en 1977, un grand nombre de ceux qui avaient été déclarés repris de justice au cours des trente années précédentes se trouvaient toujours en prison. Les dispositions transitoires de la **Loi de 1977 modifiant le droit pénal** prévoyaient à l'égard de ces individus les mesures suivantes:

> "15. (2) Les articles 693 à 695 du **Code criminel,** édictés par l'article 14, s'appliquent aux personnes condamnées, avant l'entrée en vigueur de cet article, à la détention préventive en vertu de la Partie XXI du **Code criminel** comme si les renvois à l'expression "sentence de détention dans un pénitencier pour une période indéterminée" étaient des renvois à l'expression "sentence de détention préventive."

De plus, le paragraphe 695.1(2), dont le texte est reproduit ci-dessus, prévoyait la révision annuelle par la Commission des libérations conditionnelles du cas des personnes mises sous garde en vertu de sentences de détention dans un pénitencier pour une période indéterminée imposées avant l'entrée en vigueur de la **Loi de 1977 modifiant le droit pénal.** Les personnes reconnues comme étant des délinquants dangereux en vertu des dispositions législatives de 1977 devaient, quant à elles, voir leur cas révisé par la Commission des libérations conditionnelles à l'expiration d'un délai de trois ans et, par la suite, tous les deux ans.

Il s'ensuit que, des cent soixante-treize repris de justice condamnés à la détention préventive entre 1947 et 1977, ceux qui étaient toujours vivants demeuraient assujettis aux mêmes mesures d'incarcération ou de libération conditionnelle qu'avant la modification de la loi.

Avant l'adoption de la **Loi de 1977 modifiant le droit pénal,** ces dispositions (contenues dans le projet de loi C-38) furent étudiées par le Comité permanent de la justice et des questions juridiques de la Chambre des communes,

TABLEAU I

REPRIS DE JUSTICE CONDAMNÉS À LA DÉTENTION PRÉVENTIVE SELON L'ANNÉE ET LA RÉGION DU PRONONCÉ DE LA SENTENCE, CANADA, 1948-1976

RÉGION DU PRONONCE DE LA SENTENCE	REPRIS DE JUSTICE			
	TOTAL	1948-1957	1958-1967	1968-1976
CANADA	173	52	80	41
MARITIMES	6	4	2	0
QUÉBEC	36	2	6	28
ONTARIO	19	13	2	4
PRAIRIES	39	20	14	5
COLOMBIE-BRITANNIQUE	73	13	56	4
YUKON ET TERRITOIRES DU NORD-OUEST	0	0	0	0

PRÉPARÉ PAR : La Division des systèmes d'information et de la statistique, ministère du Solliciteur général, août 1977. Figure 4.9, Recueil statistique de 1977.

SOURCE : Service des libérations conditionnelles comité que présidait l'actuel ministre de la Justice, M. Mark MacGuigan, et où je siégeais à titre de député et de critique en matière de justice.

Les membres du Comité se sont préoccupés de la nature et des modalités de la révision du cas des repris de justice assujettis à l'ancienne loi et qui seraient maintenant assujettis aux dispositions prévues au projet de loi C-38. Le ministre de la Justice de l'époque, M. Basford, fut interrogé sur le sujet [5] :

> "M. Lachance : J'aurais une très brève question à poser, monsieur le président. En posant toutes ces questions, nous oublions parfois que le projet de loi comprend trois parties; il ne traite pas seulement du contrôle des armes à feu et de l'écoute électronique, mais également des criminels dangereux, et ma question porte précisément sur les criminels dangereux. J'aimerais savoir quelle procédure sera suivie pour les criminels dangereux, que ce soit des délinquants sexuels ou non, qui sont déjà détenus dans des établissements pénitentiaires aux termes des anciennes dispositions de la loi et qui voudront demander une révision de leur dossier aux termes du projet de loi? Quelle procédure avez-vous prévue à ce propos? Combien de temps faudra-t-il pour que ces demandes soient transmises ou pour que les détenus aient la possibilité d'en appeler devant les tribunaux ou devant la Commission des libérations conditionnelles? Comment entendez-vous procéder?
>
> M. Basford : Il a été prévu qu'au moment de l'adoption du projet de loi, la Commission des libérations conditionnelles réviserait tous les cas des délinquants sexuels dangereux ou des criminels déjà incarcérés, et les réviserait en conformité de l'article 695.1(2) du projet de loi :

> (2) La Commission nationale des libérations conditionnelles doit, au moins une fois par an, examiner les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée imposée avant l'entrée en vigueur de la **Loi de 1977 modifiant le droit pénal** ...
>
> ... afin d'établir s'il y a lieu de les libérer conformément à la **Loi sur la libération conditionnelle de détenus** et, dans l'affirmative, à quelles conditions.

M. Lachance : Oui, je connais l'article 695.1 (2) proposé dans le projet de loi, mais il s'applique bien sûr, aux personnes dont le dossier aura été révisé plus tard, si la demande a déjà été refusée. Avez-vous parlé aux membres de la Commission des libérations conditionnelles afin de déterminer combien de personnes détenues actuellement seraient concernées par cette disposition? J'aimerais savoir également combien de temps sera probablement nécessaire pour étudier tous les dossiers afin de déterminer si toutes les personnes déjà détenues répondent aux nouvelles normes stipulées dans le Bill C-51, de sorte que ces détenus pourraient éventuellement être libérés s'ils n'entrent pas dans les nouvelles catégories? La même disposition figurait dans le Bill C-83 et un grand nombre de détenus qui se trouvent dans cette situation ont bien hâte de se prévaloir de ces nouvelles dispositions. Leur adoption a déjà été retardée pendant plus d'un an et ils aimeraient savoir quand ils peuvent s'attendre à voir leur dossier révisé.

M. Basford : Je peux simplement dire que tous les cas prévus par les deux dispositions contenues dans cet article seront révisés immédiatement afin de déterminer si les détenus en question entrent dans la catégorie des

> *délinquants dangereux suivant la définition donnée au bill C-83. Cela ne signifie pas évidemment que la libération conditionnelle suivra automatiquement, mais que les dossiers seront révisés immédiatement par la Commission des libérations conditionnelles en fonction des nouvelles dispositions et des nouvelles définitions. Je ne peux cependant pas vous dire exactement quel délai implique le mot "immédiatement". Vous devriez poser la question à M. Fox.* Je ne sais pas exactement quel temps il faudra à la Commission des libérations conditionnelles pour réviser tous ces dossiers, je peux simplement vous dire qu'ils seront révisés immédiatement en fonction de la nouvelle loi."
>
> (C'est moi qui souligne.)

Le 21 juin 1977, l'article 14 du projet de loi C-38, contenant les nouvelles dispositions sur les délinquants dangereux fut soumis au Comité de la justice et des questions juridiques. Voici quel fut le débat sur cette question [6] :

> "Article 14 - *Délinquants dangereux*
>
> Le président : *Nous en sommes maintenant à l'article 14*, qui traite des *délinquants dangereux*. Je demanderais au ministre de nous présenter le sujet.
>
> M. Basford : Ces nouveaux articles concernant les délinquants dangereux doivent remplacer les actuelles dispositions du Code relatives aux récidivistes et aux délinquants sexuels dangereux; ces articles seront abrogés; et un nouveau type de délit sera créé prévoyant une peine d'une durée indéterminée pour les délinquants dangereux.

La procédure que nous proposons a été soigneusement définie à l'article 687. Lorsqu'une inculpation a été prononcée pour une infraction constituant des sévices graves à la personne aux termes de la définition prévue à l'article 688 et que la répétition de ces actes, notamment celui qui est à l'origine de l'infraction, prouve que le délinquant est incapable de contrôler ses actes et qu'il causera vraisemblablement la mort d'autres personnes ou causera des sévices ou des dommages psychologiques graves à d'autres personnes, etc. Lorsqu'une demande est introduite pour appliquer les dispositions régissant les délinquants dangereux, une audience est fixée au cours de laquelle le procureur de la Couronne et l'inculpé doivent fournir des témoignages quant au caractère de l'accusé, tandis que ce dernier doit essayer de prouver que les allégations quant à son état d'esprit sont non fondées. L'inculpé peut être écroué au cours des audiences et le juge peut ordonner un examen.

Les dispositions du Code criminel relatives à une expertise de psychiatre ont été étendues pour comprendre les criminologues. À l'issue des audiences, le juge a deux possibilités: soit prononcer la peine prévue dans le Code pour des sévices graves contre une personne, c'est-à-dire une peine de durée déterminée, soit décider qu'il s'agit d'un délinquant dangereux et prononcer une peine de durée indéterminée, auquel cas la sentence peut être revue. L'accusé lui-même peut interjeter appel sur toutes questions de droit ou de fait, ou toutes questions mixtes de droit et de fait, et de plus, la sentence est revue tous les trois ans par la Commission des libérations conditionnelles.

M. Woolliams : Je voudrais poser une question au ministre dès qu'il aura terminé son exposé.

> M. Basford : Je crois qu'un député a un amendement à cet article. La peine peut faire l'objet d'une révision au cours des trois premières années et, par la suite, tous les deux ans. *Des questions ont également été posées concernant les délinquants sexuels dangereux et les récidivistes actuellement incarcérés. Les dispositions de l'ancien code sont d'application dans leur cas sera néanmoins revu une fois l'an. Cette révision sera confiée à la Commission des libérations conditionnelles, qui se basera sur la nouvelle définition des délinquants dangereux. Ceci ne constitue pas une garantie que des détenus bénéficieront nécessairement de la libération conditionnelle, mais cela signifie que leur cas sera revu conformément aux nouvelles dispositions*.
>
> M. Woolliams : Ils peuvent leur accorder la libération conditionnelle.
>
> M. Basford : Ils peuvent le faire déjà maintenant."
>
> (C'est moi qui souligne.)

Je suis certain que d'autres membres du Comité et d'autres députés ont eu la même impression que moi quant au genre et aux modalités de la révision dont bénéficieraient les repris de justice encore détenus sous le régime de l'ancienne loi : leur cas serait étudié par la Commission des libérations conditionnelles en fonction des nouveaux critères de dangerosité prévus par les nouvelles dispositions sur les délinquants dangereux et, s'il était constaté qu'ils n'étaient pas dangereux selon ces critères, ils auraient droit à une libération conditionnelle. Or aucun examen du cas des repris de justice sur la base des dispositions de l'actuelle Partie XXI du **Code criminel** n'a eu lieu avant la présente enquête. La Commission des libérations conditionnelles n'était pas habilitée par la loi à procéder à un tel examen.

L'absence d'étude de leur dossier par la Commission nationale des libérations conditionnelles en fonction des critères fixés par la nouvelle Partie XXI a suscité un vif mécontentement chez les repris de justice. La Commission des libérations conditionnelles a étudié la possibilité de libérer sous condition ces repris de justice à partir des mêmes éléments dont elle se sert pour tout autre délinquant. Il s'agit des éléments définis par l'article 10 de la **Loi sur la libération conditionnelle de détenus,** qui est ainsi rédigé :

> "Pouvoirs de la Commission
>
> 10.(1) La Commission peut
>
> (a) accorder la libération conditionnelle à un détenu, sous réserve des modalités qu'elle juge opportunes, si la Commission considère que
>
> (i) dans le cas d'un octroi de libération conditionnelle autre qu'une libération conditionnelle de jour, le détenu a tiré le plus grand avantage possible de l'emprisonnement,
>
> (ii) l'octroi de la libération conditionnelle facilitera le redressement et la réhabilitation du détenu, et
>
> (iii) la mise en liberté du détenu sous libération conditionnelle ne constitue pas un risque indu pour la société".

La Commission des libérations conditionnelles, lorsqu'elle a étudié le dossier des repris de justice condamnés à la détention préventive sur le fondement de la loi abrogée, s'est surtout attachée à voir si la libération du détenu ne constituerait pas "un risque indu pour la société". Ce risque, ce n'était pas celui de la commission éventuelle d'infractions qui causent des sévices graves à la personne ou qui soient dangereuses de quelque autre façon aux termes de la Partie XXI. En effet, la Commission s'est plutôt demandé si le détenu, libéré conditionnellement, récidiverait de quelque manière, dangereuse ou non pour la sécurité d'autrui.

Il est permis de dire, je crois, que ceux d'entre nous qui siégeaient au Comité de la justice et des questions juridiques n'ont pas perçu le conflit qu'il pouvait y avoir entre l'article 10 de la **Loi sur la libération conditionnelle de détenus** et le sort qui selon nous, les législateurs, devait être celui des repris de justice.

La libération des repris de justice n'est qu'une partie du problème que pose le cas des personnes condamnées sous l'empire de l'ancienne loi. L'article 10(1)e) de la **Loi sur la libération conditionnelle de détenus** confère à la Commission nationale des libérations conditionnelles le pouvoir de révoquer librement la libération conditionnelle de tout détenu autre qu'un détenu en liberté conditionnelle qui a été relevé des obligations de la libération conditionnelle. Les repris de justice libérés conditionnellement pouvaient voir leur libération révoquée à tout moment par la Commission des libérations conditionnelles, que la conduite considérée comme inacceptable par celle-ci fût ou non dangereuse.

Ces politiques de la Commission des libérations conditionnelles, et le défaut pour le législateur d'ordonner à cette dernière d'appliquer des règles différentes de celles normalement suivies, ont fait que plusieurs repris de justice ont été pris dans un cercle vicieux. Libérés conditionnellement sous une forme ou une autre (il y en a plusieurs : absence temporaire sans escorte, libération conditionnelle de jour et libération conditionnelle pure et simple), ils étaient souvent réincarcérés pour non-respect des exigences que leur avait imposées la Commission des libérations conditionnelles.

Cette situation fut dénoncée non seulement par les repris de justice, mais aussi par les professionnels de l'appareil pénitentiaire. En 1980, la British Columbia Corrections Association a entrepris une étude sur les repris de justice toujours détenus dans les pénitenciers de Colombie-Britannique. Il n'est guère étonnant que ces questions aient d'abord été soulevées en Colombie-Britannique. Cette région compte en effet beaucoup plus de repris de justice que toute autre, la législation sur les repris de justice y ayant été utilisée beaucoup plus largement qu'ailleurs au cours des quelque trente années de son existence. L'étude de 1980 de la British Columbia Corrections Association visait notamment à déterminer si ces détenus étaient ou non dangereux. Entreprise sous l'égide de M. Don Sorochan, alors président de l'association en cause, elle s'est poursuivie sous celle du professeur Michael Jackson de la Faculté de droit de l'Université de Colombie-Britannique, spécialiste des politiques et de l'administration du système pénitentiaire canadien.

Des étudiants volontaires de la Faculté de droit de l'Université de Colombie-Britannique ont participé au projet. Ils ont obtenu de tous les repris de justice objets de l'étude qu'ils consentent à la divulgation des informations que possédait la Commission des libérations conditionnelles à leur sujet. Celle-ci, acceptant de collaborer à l'étude, a ouvert ses dossiers dans le cas des dix-huit repris de justice toujours incarcérés en Colombie-Britannique. Ce n'est là qu'une des sources d'information utilisées par l'étude. Les auteurs de celle-ci ont en effet eu des entrevues avec chacun des repris de justice, ainsi qu'avec diverses personnes, dont des agents de libération conditionnelle et des membres du personnel des établissements pénitentiaires, détenteurs de renseignements concernant ces repris de justice.

Un dossier a été établi pour chacun des dix-huit repris de justice étudiés. Il consistait en:

(1) un relevé chronologique précis des faits de la vie de l'individu depuis sa condamnation à la détention préventive;

(2) un sommaire chiffré du casier judiciaire de l'individu;

(3) et un sommaire descriptif comportant une analyse de son casier judiciaire et de son dossier de libération conditionnelle, avec la conclusion de l'auteur sur le point de savoir si le repris de justice pouvait être considéré ou non comme un délinquant dangereux sous le régime de la loi de 1977.

Voici, résumées, les conclusions de l'étude [7] :

"F. The Findings of the Study

(1) The majority of the men in the study have always been regarded as no more than serious social nuisances and have never been regarded as dangerous in terms of their propensity to commit violence;

(2) None of the men in the study can properly be regarded as dangerous offenders within the definition of the 1977 legislation;

(3) The Parole Board, in conducting its annual reviews since 1977, has not conducted those reviews against the new definition of a dangerous offender;

(4) Parole reviews of the men in the study, both before and after 1977, have been and are conducted against the legislative criteria of Section 10 of the **Parole Act** in which danger to society is only one of the relevant criteria;

(5) In a number of the cases in the study men have been detained in prison or have been returned to prison after being on parole, not because they have committed any further offences but because of a failure to abide by parole conditions regulating non-criminal activities;

(6) In a number of cases in the study men have been detained in prison or returned to prison after being on parole because of their attitude towards authority and supervision and not because of any further commission of criminal offences;

(7) In the majority of cases where men in the study have been returned to prison following the commission while on parole of further criminal offences, they have served, before

> any re-parole, a longer term of emprisonment than that to which they have been sentenced for the individual offence or offences;
>
> (8) The length of time the men in the study have served as habitual criminals is greatly disproportionate to the harm or damage they have done and to the risk of further harm or damage which they may pose to the public. The men in the study have served more time than any other group of prisoners in Canada, including those convicted of murder;
>
> (9) The men in the study have been the subject of a discriminatory and arbitrary application of the criminal law;
>
> (10) The continued confinement of the men in the study under sentences of preventive detention is unnecessary measured against both the purposes of criminal punishment and the existence of adequate alternatives."

Les deux dernières constatations de l'étude justifiaient la procédure d' **habeas corpus** qui fut engagée subséquemment [8]. Le rapport Jackson fut approuvé par la **British Columbia Corrections Association**, qui le soumit au ministre de la Justice, Mark MacGuigan, au solliciteur général du Canada, Robert Kaplan, et au président de la Commission nationale des libérations conditionnelles, William Outerbridge. Le rapport a donné lieu à un large débat sur les recours dont devraient bénéficier les repris de justice.

Le droit pénitentiaire doit beaucoup, au Canada, à deux hommes en particulier, qui ont laissé leur marque non seulement dans les affaires dont ils se sont personnellement occupés, mais aussi dans les travaux de beaucoup d'étudiants intéressés par le domaine. Il s'agit bien entendu du professeur Michael Jackson de la Faculté de droit de l'Université de Colombie-Britannique et du professeur Ronald Price, c.r., du Centre de droit correctionnel de la Faculté de droit de l'Université Queen's de Kingston. Pendant que le professeur Jackson invitait les ministres responsables et leurs fonctionnaires à mettre en oeuvre les réformes que proposait son étude, le professeur Price engageait devant la Haute Cour d'Ontario une procédure visant à obtenir un bref **d'habeas corpus** au nom de l'un des repris de justice et à faire déclarer que la détention de celui-ci violait la **Charte canadienne des droits et libertés.**

Fin juin, l'initiative du professeur Jackson amenait le ministre de la Justice et le solliciteur général à décider d'ouvrir une enquête sur la situation des repris de justice condamnés sous le régime de la loi abrogée en 1977. Cette décision devait aboutir à ma nomination le 8 juillet 1983 [9].

Le 7 juillet 1983, le juge Linden de la Haute Cour d'Ontario rendait la première partie de sa décision sur la demande **d'habeas corpus** de Percy Mitchell. Dans cette affaire, Mitchell demandait au juge Linden une ordonnance de libération en faisant valoir l'illégalité de sa détention préventive à titre de repris de justice. Le texte intégral des motifs de la décision du juge Linden en cette espèce est joint en annexe au présent rapport. Le juge Linden affirma ce qui suit [10] :

> "...I find that the continued detention of the applicant, if in fact he is no more than a social nuisance and not a danger to the public, satisfies the disproportionality test. To continue to detain such a man for more than twelve years surpasses all rational bounds of treatment or punishment, and is so

> excessive as to outrage standards of decency. The applicant's right to protection against cruel and unusual treatment or punishment thus may have been infringed. Since no evidence has been adduced to satisfy me that such an infringement constitutes a reasonable limit demonstrably justifiable in a free and democratic society, I find that the applicant may be entitled to relief pursuant to Section 24(1) of the **Charter**, subject to my comments below."

Le juge Linden déclara ensuite qu'il fallait d'abord décider si Mitchell représentait ou non un danger pour la société, et qu'il n'y avait pas lieu d'accorder de bref **d'habeas corpus** ou quelque autre réparation sur le fondement de l'article 24 de la **Charte** tant qu'il n'aurait pas été statué sur cette question. Il s'exprima en ces termes [11] :

> "Although I am not prepared to grant the relief requested, namely, an order releasing the applicant from custody, neither am I prepared to dismiss his application. I have concluded that an alternative remedy open to me is to direct that the applicant remain in custody pending the trial of an issue to determine whether he is a danger to society within the meaning of Section 688 of the present **Criminal Code**. My jurisdiction in this regard is found in s. 709 of the **Code**. Pursuant to s. 709, a court hearing and application for **habeas corpus** has the power to order further detention of the applicant and to direct that further proceedings be taken to further the ends of justice."

Voici l'ordonnance qu'a rendue le juge Linden [12] :

> "VII Order
>
> The terms of my order are as follows. The applicant may apply to this court to fix a date for the continuation of proceedings before me, if, within sixty days from the date of this order the

> Parole Board has not released the applicant, and no appeal from this order has been commenced. At the continuation of this application, the onus shall be upon the applicant to establish that he is not a danger to society. The respondent shall have the right to participate fully in the proceedings. If the applicant succeeds in satisfying me that he is not dangerous, this court shall determine the appropriate remedy to be granted pursuant either to the application for a writ of **habeas corpus**, or the application for relief under s.24(1) of the **Charter.** "

L'affaire Mitchell devait reprendre devant le juge Linden le 21 octobre 1983. J'ai joint les motifs non publiés du jugement du juge Linden à cet égard, ainsi que l'ordonnance judiciaire en résultant, en annexe au présent rapport. Suite de la décision rendue par le juge Linden le 7 juillet, la Commission des libérations conditionnelles examina le bien-fondé de la détention de Mitchell mais, une fois encore, lui refusa la libération conditionnelle. La Cour, après avoir contrôlé les preuves réunies au sujet du passé de Mitchell, son casier judiciaire et sa situation, décida ce qui suit 13 :

> "Weighing all the evidence, I am satisfied the applicant has demonstrated on a balance of probabilities that he is not dangerous according to the criteria contained in Section 688 of the present **Criminal Code.** Finding, as I do, that there is no indication whatsoever that the applicant has done anything violent, in the past 23 years, and that there is no danger of him doing violence to anyone in the future, I must conclude that his continued detention is disproportionate and thus in violation of Section 12 of the **Charter of Rights.** To continue to detain this man, who is no more than a 'social nuisance" for more than 12 years surpasses all rational bounds of treatment or punishment, and

> is so excessive as to outrage standards of decency. Such detention thus violates the applicant's constitutional right not to be subjected to cruel and unusual treatment or punishment.
>
> Accordingly, I hold the applicant's continued detention is illegal and in contravention of the **Charter of Rights**. The appropriate remedy is to grant the applications for a writ of **habeas corpus**, and for relief pursuant to Section 24(1) of the **Charter**, and to order that the applicant be released as soon as the appropriate documents can be prepared and executed, and arrangements have been made for his return to his home in Montreal."

La décision du juge Linden m'a été des plus utiles dans la conduite de la présente enquête. Le tableau 2 du présent rapport résume la situation pénale des repris de justice au 16 mai 1983 dans les diverses régions du pays. Il importe de rappeler que, pendant que l'enquête suivait son cours, la Commission nationale des libérations conditionnelles poursuivait son examen du cas des repris de justice, dont plusieurs de ceux incarcérés en mai 1983 étaient maintenant en liberté en vertu d'un programme de libération mis en oeuvre au cours de notre étude. Le contraire était aussi vrai cependant; plusieurs de ceux qui avaient été libérés sous condition en vertu du programme de mai 1983 étaient de nouveau incarcérés en raison de manquements aux obligations de leur libération conditionnelle intervenus entre ce moment et la date de l'étude. Le tableau 2 donne toutefois une indication du rapport existant à tout moment entre les incarcérés et les libérés.

Ceux qui souhaiteraient obtenir plus d'informations sur tout ce sujet pourront lire les articles suivants mentionnés dans les notes du présent chapitre [14].

TABLEAU 2

Repris de justice

RÉGION	PRÉSENTEMENT INCARCÉRÉS	PROGRAMMES DE LIBÉRATION			Illég. en liberté	TOTAL**
		Libération conditionnelle de jour	Libération conditionnelle pure et simple	Libération conditionnelle restreinte		
Atlantique	-	-	4	-	-	4
Québec	6	3	12	1	2	24
Ontario	4	-	5	3	-	12
Prairies	3	1	9	1	-	14
Pacifique	8	5	23	-	3	39
ENSEMBLE DU CANADA	21	9	53	5	5	93

** 4 cas de libération avec levée des obligations de la libération conditionnelle ne sont pas comptés dans le présent rapport

SOURCE: OIS - CSC

PRÉPARÉ PAR: L'agent de liaison statistique, Com. nat. lib. cond. - 16 mai 1983

NOTES - CHAPITRE 1

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1 Article 18 de la **Loi de 1947 modifiant le Code criminel** chap. 55, sanctionnée le 17 juillet 1947.

2 Par S.C. 1948, chap. 39, art. 43 : "Délinquants atteints de psychopathie sexuelle criminelle"

3 Article 662(2) du **Code criminel.**

4 **Loi de 1977 modifiant le droit pénal** (1976-77, chap. 53, art. 14).

5 Procès-verbaux du Comité permanent de la Justice et des questions juridiques de la Chambre des Communes, fascicule no 22, p. 17-18 (16 juin 1977).

6 Procès-verbaux du Comité permanent de la Justice et des questions juridiques, fascicule no 24, p. 56-57 (21 juin 1977).

7 Professeur Michael Jackson, "Sentences that Never End : The Report of the Habitual Criminal Study of the British Columbia Corrections Association", (décembre 1982).

8 Voir **Re Mitchell and The Queen** (1984) 6 C.C.C. (3d) 193.

9 C.P. 1982-2119 en date du 8 juillet 1983.

10 **Ibid.,** (1984) 6 C.C.C. (3d) 193 à la p. 219.

11 **Ibid.,** (1984) 6 C.C.C. (3d) 193 à la p. 220.

12 **Ibid.,** (1984) 6 C.C.C. (3d) 193 à la p. 221.

13 Motifs non publiés du jugement du juge Allan Linden en date du 21 octobre 1983, pp. 6-7.

14 Voir les articles suivants :

P.Y. Atkinson, "The Persistent Offender in Canada" (1970), 9 **Western Ont. L. Rev.** 75; Joseph Cohen, "Criminal Law : Habitual Criminals, Part X(A) of the Old Criminal Code, Appeal by the Crown, Section 677(2) of the New Code, Sufficiency of Notice, Discretion of Judge, Comments on R. v. Ryan (1954), 19 C.R. 361" [1955] **Revue du Barreau Can.** 461; C.F. Dombeck et G.W. Tranmer, "The Indeterminate Sentence under the Prisons

and Reformatories Act." (1977) 3 **Queen's L.J.** 332; Paul French, "Criminal Law : Power of Court to Award Definite Term of Imprisonment and Indeterminate Term Greater than Maximum Provided by Code : Code s. 5(1)(b), s.231(2); Prisons and Reformatories Act s.46, Common on Anderson v. The Queen [1970] R.C.S. 843" (1971), 5 **Ottawa L. Rev.** 251; C. Greenland "Dangerous Sexual Offenders in Canada" (1972) 14 **Can. J. Corr.** 44; Brian A. Grosman, "The Treatment of Habitual Criminals in Canada" (1966-67) 9 **Cr. L.Q.** 95; "The Habitual Criminal : A Comparative Study" (1967) 13 **McGill L.J.** 652; "The Habitual Criminal : Introduction", 13 **McGill L.J.** (N.Morris); Sean Harrington et Donald Devine, "The Habitual Criminal : A Review of the Jurisprudence" (1967) 13 **McGill L.J.** 683; John F. Klein, "The Dangerousness of Dangerous Offender Legislation : Forensic Folklore Revisited" (1976) 18 **Can. J. Crim.** 109; John F. Klein, "Habitual Offender Legislation and The Bargaining Process" (1972-73), 15 **Cr. L.Q.** 417; "in Law and Social Control in Canada", éd. W.K. Greenaway et S.L. Brickey, Scarborough, Prentice Hall, 1978, 42 p.; John A. MacDonald, "A Critique of Habitual Criminal Legislation in Canada and England" (1969) 4 **U.B.C.L. Rev.** 87; A.M. Marcus, "Dangerous Sexual Offender Project" (1969) 11 **Can. J. Corr.** 198; A.M. Marcus "A Multi-disciplinary Two Part Study of Those Individuals Designated Dangerous Sexual Offenders Held in Federal Custody in British Columbia, Canada" (1966) 8 **Can. J. Corr.** 90; P.T. Matlow, "Proof of previous convictions in habitual criminal applications" 1 **C.R.M.S.** 107; Alan W. Mewett, "Habitual Criminal Legislation Under the Criminal Code" (1961) 39 **Rev. du Bar. can.** 43; Alan W. Mewett, "The Suspended Sentence and Preventive Detention" (1958-59) 1 **Cr. L.Q.** 268; A.E. Popple, "Habitual Criminals", 6 C.R. 180; "Habitual Criminals", 6 C.R. 194; "Habitual Criminals", 9 C.R. 272; "Habitual Criminals", 11 C.R. 35, 139, 308; "Habitual Criminals", 12 C.R. 101; "Habitual Criminals", 14 C.R. 259; "Habitual Criminals", 16 C.R. 162; "Habitual Criminals" 19 C.R. 284; "Habitual Criminals", 20 C.R. 248; "Habitual Criminals", 21 C.R. 41; "Preventive Detention", 22 C.R. 393; "Habitual Criminals", 24 C.R. 279; "Habitual Criminals", 32 C.R. 363; "Habitual Criminal Procedure", 38 C.R. 115; "Habitual Criminals", 42 C.R. 1; "Habitual Criminal Applications", 44 C.R. 85; Ronald R. Price, "Psychiatry, Criminal Law Reform and the 'Mythophilic' Impulse : On Canadian Proposals for the Control of the Dangerous Offender" (1970-71) 4 **Ottawa L. Rev.** 1; David Spring, "Criminal Law: Habitual Criminal. Crim. Code

s. 660. **Mendrik v. The Queen,** 6 D.L.R. 3rd 257" (1970-71) 4 **Ottawa L. Rev.** 318; Ray Stortini, "Preventive Detention of Dangerous Sexual Offenders" (1975) 17 **Cr. L.Q.** 416; H. Van Rooy, "An Investigation into Habitual Offenders", 7 **Can. J. Corr.** 178.

CHAPITRE 2

HISTORIQUE

La législation sur les repris de justice et la notion de détention préventive ont pour origine le rapport d'un comité anglais chargé de l'étude d'un projet de réforme pénale à la fin du siècle dernier. Le Comité Gladstone, du nom de son président H.J. Gladstone, déposa son rapport en 1895. Bon nombre de réformes majeures ont été introduites dans le domaine de la pénologie à la suite des recommandations de ce rapport [1]. Une décennie plus tard, M. Gladstone devenait ministre de l'Intérieur (**Home Secretary**) et, en tant que tel, se voyait confier la responsabilité de présenter au Parlement du Royaume-Uni plusieurs projets de loi qui transformèrent le système pénitentiaire de ce pays. Au nombre de ces textes, mentionnons le **Probation of Offenders Act, 1907** [2], le **Children Act, 1908** [3], et le **Prevention of Crime Act, 1908** [4].

Les réformes proposées par le Comité Gladstone avaient pour but de remédier à l'incapacité du système pénitentiaire d'alors de mettre au point des programmes de réadaptation des jeunes délinquants. Les recommandations du Comité entraînèrent la création du système britannique d'établissements réservés aux mineurs (**Borstal System**) . Ce système comportait la mise en place d'un plus grand nombre d'établissements "ouverts" et mettait l'accent sur la réforme, notamment celle du caractère, et sur la réinsertion sociale plutôt que sur la punition.

Avant d'aller plus loin, je me dois d'exprimer ma gratitude aux éminents auteurs dont les travaux m'ont considérablement aidé dans ce domaine. Le rapport du professeur Jackson contient un résumé de l'historique de la législation sur les repris de justice. Il y a aussi, autre référence fort importante, l'ouvrage de Norval Morris intitulé **The Habitual Criminal** [5], dont l'introduction a été reproduite au volume 13 du **McGill Law Journal**, à la page 534. L'article de John A. MacDonald dans le **U.B.C. Law Review** [6] contient aussi une mine de renseignements.

M. MacDonald, dans son article, formule les observations suivantes au sujet du rapport du Comité Gladstone:

> "However, the Gladstone Committee was not prepared to admit the capacity for reformation of a "large class of habitual criminals - who live by robbery and thieving and petty larceny - who run the risk of comparatively short sentences with comparative indifference". To punish such offenders for their specific offences was almost useless because the real offence was their "wilfull persistence in the deliberately acquired habit of crime." It was therefore recommended that a new form of sentence be instituted which would segregate such offenders for long periods of time not under conditions of first-class hard labour, but at work under "less onerous conditions". The result it was suggested would be to deter many persistent offenders from further criminal behaviour while protecting the community through segregating proven habitual criminals for lengthy periods."

Le **Prevention of Crime Act** de 1908, qui, comme je l'ai déjà dit, découlait du rapport du Comité Gladstone, prévoyait la détention préventive des repris de justice. La même loi, toutefois, instituait aussi un régime de placement des jeunes délinquants en institution pour mineurs. Il est intéressant de noter que cette loi reposait sur l'idée qu'il fallait, bien que pour des raisons opposées, traiter moins sévèrement que les autres malfaiteurs aussi bien le jeune délinquant que le délinquant d'habitude : le jeune délinquant parce qu'il y avait toujours un espoir de le réadapter; le criminel d'habitude parce qu'il n'était pas tant privé de liberté pour les infractions criminelles qu'il avait commises que pour celles qu'il risquait de commettre s'il était en liberté.

L'article 10 du **Prevention of Crime Act** de 1908 prévoyait notamment ce qui suit :

> "10.(1) When a person is convicted of an indictment of a crime - and subsequently - admits that he is or is found by the jury to be an habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reasons of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on determination of the sentence of penal servitude he be detained for such further period not exceeding 10 nor less than 5 years, as the court may determine (known as) preventive detention...
>
> (2) A person shall not be found to be an habitual criminal unless the jury finds on evidence...
>
> (a) that since attaining the age of 16 years he has at least 3 times previously to the conviction of the crime charged - been convicted of a crime - and that he is leading persistently a dishonest or criminal life; or

> (b) that he has on such previous conviction been found to be an habitual criminal and sentenced to preventive detention."

Le professeur Radzinowicz, de l'Institut de criminologie de Cambridge, a expliqué quels étaient à l'origine les buts de la loi anglaise en question :

> "During the debates [preceding the **Prevention of Crime Act** of 1908] Lord Gladstone reiterated that it had been devised as a weapon against the dangerous, hardened offender, not against those who were "a nuisance rather than a danger to society". But only three years later Winston Churchill had to hammer home this lesson in a memorandum and letter to the police. The aim was to gain control over the professional, the offender who had given himself up to a life of crime... His dangerousness would be confirmed by such factors as the use of violence in conjunction with his other offences, the possession of firearms or other lethal weapons, and the sophistication of his tools or techniques...
>
> Still more serious, it became clear that Churchill's warnings had been forgotten, that the sentence was being imposed largely upon the wrong offenders. The majority were merely offenders against property, property often worth less than one hundred pounds. Only a tenth of them had committed violence against the person, sexual crimes or robbery... It was again the nuisances rather than the dangerous ... who were the chief recipients of preventive detention under the 1948 Act [The **Criminal Justice Act,** 1948 which was the successor legislation to the **Prevention of Crime Act** of 1908].

> [Preventive detention] has given rise to much sense of unfairness and has shown no compensating advantages in reformation... The value of the sentence as a general deterrent has appeared to be slight, especially as it has been used in so few cases. And because it has been of comparatively little use, and for minor rather than for dangerous criminals, it has failed to fulfill its purpose as an additional means of protecting the public."7

Les débats parlementaires sur le **Prevention of Crime Act** de 1908 sont intéressants. Le projet de loi initial proposait une détention préventive à durée indéterminée. Suite à ces débats, l'on décida que cette durée ne pourrait aller que de cinq à dix ans de plus que la peine attachée à la condamnation pour l'infraction elle-même. La notion de détention préventive liée à une condamnation pour une autre infraction fut baptisée du nom de "système à deux volets" **(dual track system)**. Cette théorie de détermination de la peine fit, au cours des débats, l'objet de critiques de la part de certains députés qui y voyaient une double peine. Mais ce système a finalement formé la base de la législation anglaise sur les criminels d'habitude mise en place par la loi de 1908.

L'Angleterre n'est pas le seul pays à avoir adopté une législation sur les récidivistes. Norval Morris, dans l'introduction de son ouvrage dégage un certain nombre d'éléments communs à tous les textes législatifs de ce genre :

> "Persistent Offender, Professional Criminal, Incorrigible Offender, Dangerous Recidivist (Finnish law of 1932), Hardened Offender, Relegable, Habitual Criminal, and many similar terms are

used to define certain groups of recidivists against whom various countries are prepared to take special measures to protect themselves, - measures usually involving their protracted segregation from society.

Those countries which make use of this conception of the habitual criminal, define its scope in relation to some or all of the following factors:-

1. Number of crimes committed by an offender (sometimes over a certain period or since a certain age).
2. Type(s) of crimes committed by an offender (sometimes over a certain period or since a certain age).
3. Seriousness of offender's last crime(s) (and sometimes period since commission of previous crime).
4. Number and type(s) of punishments he has undergone (sometimes over a certain period or since a certain age).
5. Extent of danger to public presented by such type(s) of crime.
6. Extent of danger to public presented by such an offender.
7. Age of the offender.
8. Mental condition of the offender.
9. Biological and social background of the offender.
10. Susceptibility of the offender to reformation."[8]

L'introduction de M. Morris est reproduite dans le McGill **Law Journal**, comme présentation cette fois d'une étude comparative sur la législation visant les criminels d'habitude dans les États américains et pays suivants : le Maine, la Georgie, le Missouri, Washington, la Californie, le Texas et la France, l'Allemagne, l'Australie, l'Inde et l'URSS. L'étude débute à la page 654 du volume 13 du McGill **Law Journal**.

Au Canada, la législation sur les repris de justice résulte du rapport d'une commission royale d'enquête, présidée par le juge Archambault, qui avait été instituée après que divers troubles se furent produits dans les prisons vers le milieu des années trente. Ce rapport, publié en 1938, réclamait de nombreuses réformes dans l'administration et dans le régime pénitentiaires [9].

La Commission Archambault avait été précédée, en Angleterre, par une étude du comité ministériel nommé par le ministre de l'Intérieur. Ce comité avait recommandé d'apporter des changements radicaux au système anglais de détention préventive. Les recommandations du comité en question amenèrent en Angleterre, en 1948, l'abrogation pure et simple des dispositions sur les criminels d'habitude.

Malgré sa connaissance des propositions du comité ministériel anglais, la Commission Archambault recommanda la détention préventive de certains criminels d'habitude, définis comme suit:

> "... il restera toujours une certaine proportion de criminels dont la tendance au mal est incorrigible...pour qui les "barreaux de fer" et les "murs des prisons" ne sont plus un objet de terreur et chez qui ne demeure aucun espoir ni désir d'amendement, si toutefois ils les ont jamais éprouvés."[10]

La Commission Archambault proposa l'adoption d'une loi sur les repris de justice semblable à celle en vigueur en Angleterre, avec les différences suivantes:

Il était recommandé:

(1) de condamner les repris de justice à une peine d'emprisonnement de durée indéterminée;

(2) de mettre en place un système "à un seul volet" (**single track system**), où l'emprisonnement à durée indéterminée remplacerait toutefois la peine relative à l'infraction principale.

(3) de séparer les repris de justice condamnés à la détention préventive des autres détenus et, à cette fin, de les placer dans un établissement spécial devant être construit sur une île située en aval de la ville de Québec.[11]

Mais la guerre retenait alors toute l'attention du Parlement. Ainsi, la consécration législative des recommandations de la Commission Archambault n'intervint-elle qu'en 1947, année où le texte sur les repris de justice dont il a déjà été question fut présenté en vue de modifier notre **Code criminel**.

Il existait cependant des différences importantes entre la législation canadienne et la législation anglaise. La loi anglaise prévoyait une peine indéterminée certes, mais avec un maximum et un minimum. La loi canadienne, elle, ne fixait aucune limite à la durée de la peine que le repris de justice pourrait avoir à exécuter. Elle n'était donc pas indéterminée dans des limites précises, mais totalement indéterminée, la Commission nationale des libérations conditionnelles ayant toute latitude quant au temps d'incarcération du repris de justice. Le texte soumis à la Chambre des communes en juillet 1947 suscita un vif débat. Le gouvernement invoqua les recommandations de la Commission Archambault à l'appui de son projet. Toutefois, les réformes pénitentiaires proposées par la Commission Archambault n'avaient pas encore été mises en oeuvre bien que neuf années se fussent déjà écoulées depuis la publication du rapport. Un député critiqua le projet dans les termes suivants:

> "Avant d'adopter une telle façon de procéder que les tribunaux pourraient rejeter plus tard, ne vaudrait-il pas mieux attendre ce que rapporteront les propositions sur la réforme pénitentiaire?...Les repris de justice sont les victimes d'un vicieux système mal conçu. Comment les détenus de ces institutions peuvent-ils éviter de devenir des repris de justice... Le système est voué à l'échec parce qu'il ne se fonde pas sur la véritable réforme des prisons."12

Certains députés prédirent, et cela se vérifia, que les nouvelles dispositions ne seraient pas appliquées de façon uniforme, tout dépendant de l'attitude que déciderait d'adopter en la matière le procureur général de chaque province. M. Diefenbaker a bien résumé ces deux aspects du problème:

> "Le ministre n'aurait pas dû présenter les dispositions de la Partie X A), relative aux repris de justice, avant de mettre à exécution un régime de réhabilitation comme celui qu'a recommandé la Commission Archambault. Je conviens avec l'honorable représentant de Broadview que cette disposition n'est autre chose qu'une mesure législative punitive à l'intention du récidiviste, sans lui fournir l'occasion de se réhabiliter à sa sortie d'une institution pénale."[13]

Et un peu plus loin:

> "Si le fait d'être un repris de justice entraîne une punition, pourquoi une disposition permettrait-elle au procureur général d'une province de décider que des poursuites seront intentées sous l'empire de cet article, alors que le procureur général d'une autre province décidera autrement dans des circonstances analogues? **Le Code criminel** ... devrait être appliqué uniformément par tout le Canada, sans égard aux désirs des procureurs généraux."[14]

Un autre député, M. McIvor, trouvait la loi trop sévère, voire inhumaine. Il s'exprimait en ces termes:

> "M. McIvor: Je ne m'y connais guère en droit; n'empêche que la présente modification me fait peur. Il semble qu'un particulier ne puisse se défendre des influences qui modifient sa façon de vivre. Pourtant, personne ne doit être à tel point dépravé qu'il ne puisse améliorer sa conduite."[15]

Ce à quoi le ministre de la Justice, J.L. Ilsley, lui répondit:

> "Le ministre de la Justice: L'article a pour fin de contraindre à une détention préventive les repris de justice, pendant une période de temps indéterminée, mais le ministre de la Justice pourra se renseigner sur leur conduite. Le ministre veillera donc sur la conduite de cet individu, comme le prévoit l'article ... Il ne s'agit pas nécessairement d'une détention perpétuelle. Il y aura élargissement du prisonnier si celui-ci se réforme."[16]

En réponse aux diverses critiques des députés, le ministre de la Justice avança l'idée qu'on s'intéressait trop au sort des repris de justice:

> "Ce qui importe, en somme, c'est de protéger la société, et il m'est impossible d'admettre que la loi soit injuste à l'endroit d'hommes qui ont commis trois fois de graves délits, comme l'indiquent leurs condamnations, et qui en ont commis un quatrième, un juge et un jury ayant constaté qu'ils mènent continûment une vie criminelle."[17]

Au terme du débat, les modifications proposées au **Code criminel** furent adoptées intégralement et entrèrent en vigueur le 1er janvier 1948. Paradoxalement, personne ne releva que la loi anglaise dont s'inspirait la loi canadienne était largement critiquée, ni que le gouvernement anglais s'apprêtait justement à l'abroger. Les dispositions de la loi anglaise de 1908 furent remplacées par l'article 21 du **Criminal Justice Act** [18] de 1948 qui, dans le cas des récidivistes, autorisait la détention préventive ou la rééducation en lieu et place de toute autre peine. La détention préventive fut finalement abolie en Angleterre par le **Criminal Justice Act** [19] de 1967, dont l'article 37 introduit la notion d'aggravation de peine en cas de récidive.

Il faut après cela attendre près de vingt ans avant que quelqu'un, au Canada, s'intéresse de nouveau à la législation sur les repris de justice. En effet, ce n'est qu'en 1965 que le Comité canadien de la réforme pénale et correctionnelle, présidé par le juge Ouimet, a examiné l'application de notre législation sur les repris de justice dans le cadre de son étude générale du système pénitentiaire. Entre 1947 et 1965, le régime des repris de justice fut modifié sur certains points au cours des sessions parlementaires de 1953-1954 et de 1960-1961.

Les modifications apportées en 1954 au **Code criminel** comportaient des changements importants, en matière de procédure, aux articles sur les repris de justice. C'est un tribunal sans jury qui connaissait dorénavant des requêtes visant à faire déclarer quelqu'un repris de justice. La détention préventive était quant à elle définie comme "la détention dans un pénitencier pour une période indéterminée", plutôt que comme un internement "dans une prison ou partie de prison réservée à cette fin".
Le **Code** fut en outre modifié pour qu'il soit bien clair que les trois condamnations nécessaires pour être reconnu repris de justice doivent avoir été prononcées en des "occasions distinctes et indépendantes."[20]

Il est intéressant de remarquer que l'idée de soumettre les repris de justice à une détention moins sévère que les autres détenus, de même que celle de les isoler sur quelque île (mythique ou réelle) du fleuve Saint-Laurent, près de Québec, sont abandonnées. On ne prétend plus fournir aux repris de justice des établissements plus appropriés à leur réinsertion sociale. La loi reconnaît la réalité : les repris de justice seront emprisonnés dans les mêmes pénitenciers que les autres condamnés.

Avec l'adoption en 1958 de la **Loi sur la libération conditionnelle de détenus,** la Commission nationale des libérations conditionnelles s'est vu confier le rôle de révision qui jusqu'alors était exercé par le ministre de la Justice.

Durant la session du Parlement, le gouvernement présenta de nombreuses réformes du **Code criminel**, dont certaines modifications importantes aux dispositions sur les repris de justice. Les principales modifications peuvent se résumer ainsi [21] :

(1) Le système à deux volets fut aboli et, à partir d'alors, les peines de détention préventive durent être exécutées à la place de toute autre condamnation infligée pour la perpétration d'une infraction. [22]

(2) Le ministre de la Justice devait dorénavant examiner une fois par année, plutôt qu'aux trois ans, la situation des personnes soumises à la détention préventive. [23]

(3) Le délai imparti pour aviser le délinquant du dépôt de la demande visant à le faire déclarer repris de justice fut porté d'un à sept jours francs avant le prononcé de la sentence relative à l'infraction principale, et on obligea le poursuivant à le donner dans les trois mois du prononcé de la sentence relative à l'infraction. [24]

Voilà donc quelle a été l'évolution législative des dispositions sur les repris de justice jusqu'en 1968, année où le Comité Ouimet a présenté son rapport. Au 31 août 1968, date à laquelle le Comité Ouimet déposa son étude sur les repris de justice, cent trente-sept personnes avaient été condamnées à la détention préventive à titre de repris de justice. Le Comité Ouimet a étudié le casier judiciaire des quatre-vingts qui, à ce moment-là, étaient encore détenues dans des pénitenciers canadiens, en vue de déterminer le genre de personnes auxquelles la loi avait été appliquée.

Le Comité a recherché si les infractions commises par les repris de justice étaient ou non des "infractions contre la personne". Il a également divisé les infractions contre la personne en deux catégories : "graves" et "mineures".

Cette étude a abouti à la conclusion que près de 40 % de ceux qui avaient été condamnés à la détention préventive ne semblaient pas avoir représenté une menace à la sécurité d'autrui, mais qu'un tiers des personnes incarcérées comme repris de justice semblaient avoir constitué une menace grave à la sécurité d'autrui. En ce qui concerne le reste des cas étudiés, il n'y avait pas suffisamment de preuves, estima-t-on, pour permettre de conclure que les intéressés mettaient sérieusement en danger la sécurité d'autrui. Le Comité a conclu que :

> "... bien que les dispositions législatives concernant les repris de justice aient été appliquées pour protéger le public contre certains délinquants dangereux, elles l'ont également été contre un nombre considérable de multirécidivistes qui constituent peut-être un sérieux embarras social mais non une menace sérieuse à la sécurité des gens." 25

Même si n'importe quelle étude des statistiques relatives aux repris de justice eût révélé que la législation sur les repris de justice n'était pas toujours appliquée de la même façon, le Comité Ouimet s'est penché longuement sur ce point. Les tableaux publiés par le Comité indiquent que l'application de la législation sur les repris de justice variait selon la région, du fait que, sur les quatre-vingts personnes condamnées à la détention préventive, quarante-cinq l'avaient été en Colombie-Britannique et trente-neuf l'avaient été dans la ville de Vancouver. Le Comité a jugé que:

> "Une législation dont l'application est susceptible de varier à ce point ne doit pas faire partie d'un système rationnel de corrections." 26

En outre, le Comité n'a pu découvrir aucun fondement rationnel à l'application qui a été faite de la législation sur les repris de justice. Citons encore une fois ses conclusions :

> "Nous n'avons pu découvrir aucun fondement logique ou rationnel à son application lorsqu'on y a eu recours. Son application discriminatoire contre quelques délinquants, en regard du grand nombre de récidivistes contre qui la législation pourrait s'appliquer, a naturellement fait naître chez ceux contre lesquels elle est invoquée des sentiments d'amertume et d'injustice... De l'avis du Comité, l'effet dissuasif de la législation sur le délinquant habituel est nécessairement léger étant donné qu'elle entre si rarement en jeu." 27

Le Comité Ouimet a recommandé que la législation sur les repris de justice soit abrogée et remplacée par de nouvelles dispositions sur les délinquants dangereux, qui comprendraient également les dispositions relatives aux délinquants sexuels dangereux. L'on a donné suite à cette proposition en instituant la nouvelle Partie XXI du **Code criminel par la Loi de 1977 modifiant le droit pénal.**

Avant de terminer le présent historique des dispositions sur les repris de justice, j'ajouterai que l'étude approfondie du cas des repris de justice encore vivants à laquelle j'ai procédé m'a conduit aux mêmes conclusions que le Comité Ouimet. Le nombre de personnes à l'égard desquelles je recommande la levée complète de toute mesure de détention préventive montre assez que la majorité des personnes reconnues comme des repris de justice constituaient pour la société un élément perturbateur plutôt qu'un véritable danger. Je ne me propose pas d'examiner en détail les nombreuses décisions judiciaires qui ont abordé la question de la législation sur les repris de justice lorsque celle-ci était en vigueur. Je mentionnerai cependant certaines décisions importantes.

Dans l'affaire **R. v. Hunter,** [1921] 1 K.B. 55, la Cour d'appel d'Angleterre a statué que le fait d'alléguer qu'un accusé est un repris de justice ne constitue pas une inculpation d'infraction criminelle, mais plutôt une allégation de fait qui permet au tribunal d'infliger une peine spéciale. Ces questions ont souvent été étudiées par les tribunaux canadiens, à cause des efforts déployés par les repris de justice pour obtenir une révision de leur cas [28].

La validité, sur le plan constitutionnel, de la législation sur les repris de justice a été examinée à l'occasion de nombreuses affaires antérieures à l'adoption de la **Charte des droits et libertés.** Dans l'affaire **R. v. Buckler,** [1970] 2 C.C.C. 4 (Ont.), le tribunal a décidé que la détention préventive n'entre pas dans la catégorie des "peines ou traitements cruels et inusités" interdits par l'article 2b) de la **Déclaration canadienne des droits,** mais que cette disposition pourrait toutefois aider le juge de première instance dans l'exercice du pouvoir d'appréciation que lui accorde l'article 660 pour déterminer si la détention préventive était "nécessaire à la protection du public". Une décision semblable a été rendue en ce qui concerne la détention préventive des délinquants sexuels dangereux dans l'affaire, R. v. **Roestad** [1972] 19 C.R.N.S. 190, 5 C.C.C. (2d) 564 29.

La Cour suprême du Canada a confirmé une décision où la Cour d'appel du Québec avait statué que les dispositions relatives à la détention préventive faisaient partie de la procédure de détermination de la peine et relevaient donc du pouvoir que possède le Parlement fédéral en matière de droit pénal. Il s'agit de l'affaire **Ex Parte Matticks,** (1972) 10 C.C.C. (2d) 438 (Cour d'appel du Québec); confirmée par (1974) 15 C.C.C. (2d) 213 (Cour suprême du Canada).

Bien que je sois surpris qu'on ait pu avoir quelque doute sur cette question, la Cour suprême du Canada a précisé en 1957 que c'était à la Couronne qu'il incombait de prouver au-delà de tout doute raisonnable l'existence des éléments nécessaires pour conclure qu'un accusé était un "repris de justice" 30. La décision de la Cour d'appel de la Colombie-Britannique dans l'affaire **Regina v. Channing,** [1966] 1 C.C.C. 97, énumérait quatre critères sur lesquels s'étaient fondés les tribunaux pour décider si un inculpé avait continuellement un comportement criminel. Après avoir fait remarquer que ces critères n'étaient pas limitatifs, le juge Shephard les a résumés ainsi :

> "(1) whether the substantive offence was premeditated or executed without planning;
>
> (2) whether the accused had done anything unlawful or dishonest during the period between his last release from custody and commission of the substantive offence;

> (3) whether the substantive offence was of the same general pattern as the accused's previous offences:
>
> (4) whether the accused had been habitually associating with criminals."

L'application de la détention préventive et la distinction entre les individus considérés comme "nuisibles" sans qu'ils soient une "menace", ont été abordées dans les arrêts **Poole v. R.** (1968) 3 C.R.N.S. 213 (C.S. du Can.), et **Mendick v. R.**, (1969) 69 W.W.R. 17 (C.S. du Can.). Ces arrêts sont à l'origine de l'arrêt **R. v. Hatchwell.** Dans **Hatchwell,** [1974] 1 W.R.R. 307, la majorité de la Cour d'appel de la Colombie-Britannique, confirmant une ordonnance de détention préventive que le juge de la Cour provinciale avait infligée à Hatchwell, décrit ce dernier comme "un voleur professionnel à qui il arrive parfois de travailler", revenant constamment aux crimes contre les biens et constituant "une grave menace pour la société". Cependant, la Cour suprême du Canada jugea que Hatchwell n'était pas une menace mais plutôt simplement "nuisible", et qu'il n'aurait pas dû faire l'objet d'une détention préventive; aussi infirma-t-elle l'arrêt de la Cour d'appel de la Colombie-Britannique, [1975] 4 W.W.R. 68; 21 C.C.C. (2d) 201.

Je ne saurais terminer l'analyse historique de la législation sur les repris de justice sans tenter de dire si cette législation a vraiment atteint ses objectifs. Je partage l'avis d'Allan W. Mewett, exprimé dans son article intitulé "Habitual Criminal Legislation under the Criminal Code" 31 :

> "Perpetual incarceration, besides being expensive, is a savage sentence to pass upon anyone for no other reason that the protection of other people, though it may, in some extreme cases be justified. Obviously the better, that is, less expensive and more humane, method of achieving this object is by some form of treatment. Once again, it is regrettable but true that the fewer habitual criminals there are, the less likely it is that anyone will go to the trouble and expense of attempting any treatment. Lord Goddard, during the debate in the House of Lords on the preventive detention section of the English Criminal Justice Bill of 1948, remarked:
>
> > "I hope that before this Bill becomes law, if it does become law, we in the courts will have that which I think we are entitled to have - namely, full information as to what these novel methods of training are."

Au Canada, le rapport Archambault soulevait la possibilité de créer des établissements de formation et de traitement des repris de justice. Jusqu'en 1961, les modifications à l'article 665(2) du **Code criminel** prévoyaient des établissements spéciaux pour les repris de justice afin de favoriser leur traitement. Ces établissements et programmes de traitement spéciaux n'ont cependant jamais existé; la détention préventive a lieu dans les pénitenciers ordinaires et les repris de justice ne sont soumis à aucun régime particulier, qu'il s'agisse de travail ou de traitement.

Je dois dire que mon étude des repris de justice encore en vie a permis de découvrir que la carrière criminelle de certains avait été stoppée par le fait d'avoir été déclaré repris de justice et condamné à la détention préventive. Mais dans l'ensemble, je ne suis pas convaincu que les infractions commises par les repris de justice libérés sous condition aient démontré qu'ils constituaient une menace sociale suffisamment grave pour justifier une peine indéterminée et le coût incroyable pour le contribuable de réinsérer socialement des individus qui pour la plupart n'étaient que nuisibles. En fait, il semblerait bien, si l'on s'en fie à certains, que les sentences indéterminées produisent un effet contraire à celui recherché. Radzinowicz affirme à cet égard :

> "The indeterminate factor in their release has given rise to much of unfairness and has shown no compensating advantages in reformation."[32]

Dans le même sens, Mewett fait remarquer ce qui suit :

> "Any hope of reform may well be defeated if the prisoner is confronted with the fact that he is never to be a completely free person again. The depressing realization that he will either live and die in prison, or that he will live with the threat of prison hanging over him if he violates his parole, without necessarily committing any further criminal offence, must militate against genuine reform."[33]

Ces affirmations d'éminents spécialistes confirment le témoignage souvent déchirant des repris de justice, dont plusieurs sont maintenant très âgés, qui ont déposé à l'enquête quant à l'effet de longues années d'incarcération et du cercle vicieux dans lequel ils ont été pris.

Notes - Chapitre 2

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1 **Report of the Committee on Prisons** (London H.M.S.O., 1895)

2 **Probation of Offenders Act,** 1907, 7 Edward 7, c.17.

3 **Children Act,** 1908, 8 Edward 7, c.67.

4 **Prevention of Crime Act,** 1908, 8 Edward 7, c.59.

5 **The Habitual Criminal,** Toronto, Longmans and Green, 1951.

6 4 **U.B.C. Law Review** 87.

7 Radzinowicz, L., **The Dangerous Offender,** 41 **The Police J.** 411 (1968).

8 13 **McGill Law Journal,** aux pp. 537 et 536.

9 **Rapport de la Commission royale d'enquête sur le système pénal du Canada,** Ottawa, 1938.

10 **Ibid.,** p. 228.

11 Tel qu'il est résumé dans "A Critique of Habitual Criminal Legislation in Canada and England", John A. MacDonald, 4 **U.B.C. Law Review** 87, à la p. 90.

12 **Débats de la Chambre des communes (Canada),** 1947, Vol. VI, pp.5056-57.

13 **Ibid.,** p.5057.

14 **Ibid.,** p.5058.

15 **Ibid.,** p.5056.

16 **Ibid.,** p.5056.

17 **Ibid.,** p.5061.

18 **Criminal Justice Act, 1948,** 11 and 12 GO6, s. 21.

19 **Criminal Justice Act, 1967,** Chapter 58, Schedule 7, s. 21.

20 S.C. 1953-54, c. 51, art. 662(2), 659(a), 659(c), et 660(2)(a).

21 "A Critique of Habitual Criminal Legislation in Canada and England", John A. MacDonald, 4 **U.B.C. Law Review** 87, aux pp.94-95.

22 S.C. 1960-61, c.43, art.33 (1) (modifiant l'art. 660(1)).

23 Ibid., art.39 (modifiant l'art. 666).

24 Ibid., art.35(1)(modifiant l'rt 662(1)).

25 **Rapport du Comité canadien de la réforme pénale et correctionnelle,** 1968, p. 268

26 **Ibid.,** à la page 270.

27 **Ibid.,** à la page 263.

28 Voir **Kirkland v. R.** [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1; **R. v. MacKenzie** (1960) 33 C.R. 361, 128 C.C.C. 92 (Cour d'appel de la Saskatchewan); **Rusch v. R.** [1953] 1 R.C.S. 373, 16 C.R. 316, 105 C.C.C. 340; **R. v. Robinson** (1952) 14 C.R. 258, 102 C.C.C. 232 (Cour d'appel de la Colombie-Britannique) et [1951] R.C.S. 522, 12 C.R. 101, 100 C.C.C. 1

29 Autorisation d'interjeter appel refusée (1972) 19 S.R.N.S. 190, à la p. 235 (Cour d'appel de l'Ontario).

30 **Kirkland v. The Queen** [1957] R.C.S. 3.

31 "Habitual Criminal Legislation under the Criminal Code" 39 **Canadian Bar Review** 43, à la p. 54.

32 Leon Radzinowicz, "The Dangerous Offender", **The Police,** 41 (1968) p.442.

33 Allan W. Mewett, "Habitual Criminal Legislation Under the Criminal Code" 39 **Can. Bar Review** (1961) p.55-56.

CHAPITRE 3

PRÉVISION DE LA DANGEROSITÉ

Le premier élément de mon mandat est de :

> "(i) faire enquête sur le cas de chacune des 93 personnes qui sont encore reconnues comme repris de justice en vertu des dispositions législatives abrogées par le Parlement en 1977, afin de déterminer lesquelles d'entre elles ne présentent plus de danger pour la sécurité d'autrui si l'on tient compte des critères et de la philosophie énoncés à la Partie XXI du **Code criminel**"

Dans bien des cas, ma tâche a été relativement facile puisque les repris de justice en cause n'ont jamais, que l'état dangereux soit déterminé à partir des critères définis à la Partie XXI du **Code criminel** ou de quelque autre critère, constitué un danger pour la sécurité d'autrui. Dans les autres cas cependant, il m'a fallu procéder à un examen scrupuleux du dossier pour me prononcer sur la délicate question de savoir si l'intéressé présentait encore un danger.

Mon enquête m'a tout d'abord amené à me pencher sur le casier judiciaire et le comportement passé de chaque repris de justice afin de voir s'il avait déjà été condamné pour sévices graves à la personne au sens de l'article 687 du **Code criminel.** Cet article définit en effet cette expression comme désignant :

> "(a) les infractions (la haute trahison, la trahison, le meurtre au premier degré ou au deuxième degré exceptés) punissables, par voie de mise en accusation, d'une peine d'emprisonnement d'au moins dix ans et impliquant

(i) l'emploi, ou une tentative d'emploi, de la violence contre une autre personne, ou

(ii) une conduite dangereuse, ou susceptible de l'être, pour la vie ou la sécurité d'une autre personne ou une conduite ayant infligé, ou susceptible d'infliger, des dommages psychologiques graves à une autre personne, ou

(b) les infractions ou tentatives de perpétration de l'une des infractions prévues aux articles 246.1 (agression sexuelle), 246.2 (agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles) ou 246.3 (agression sexuelle grave)."

La Commission d'enquête a transmis à chacun des repris de justice dont elle examinait le cas un avis auquel étaient joints :

(a) comme annexe I, son casier judiciaire;

(b) comme annexe II, les condamnations susceptibles de constituer des sévices graves à la personne au sens de l'article 687; et

(c) comme annexe III, le relevé des infractions de nature à être considérées comme violentes ou comme dangereuses mais ne pouvant être qualifiées de sévices graves à la personne au sens que l'article 687 donne à cette expression.

Ainsi que je l'ai déjà mentionné, bon nombre des repris de justice considérés n'avaient jamais été condamnés pour infraction constituant des sévices graves à la personne au sens qu'attribue à cette expression l'article 687. Un nombre important de ces mêmes individus n'avaient pas davantage été reconnus coupables d'infractions susceptibles d'être classées sous l'"annexe III", c'est-à-dire d'infractions qui, sans entrer dans la catégorie des sévices graves à la personne, auraient présenté un caractère de violence ou auraient comporté un élément de danger.

Toutefois, lorsque la Commission d'enquête constatait que le repris de justice s'était rendu coupable de sévices graves à la personne, il convenait alors de rechercher si l'intéressé tombait dans le champ d'application de l'article 688 du **Code criminel**, c'est-à-dire s'il :

> "(a) ... constitue un danger pour la vie, la sécurité ou le bien-être physique ou mental de qui que ce soit, en vertu de preuves établissant
>
> (i) que, par la répétition de ses actes, notamment celui qui est à l'origine de l'infraction dont il est déclaré coupable, le délinquant démontre qu'il est incapable de contrôler ses actes et permet de croire qu'il causera vraisemblablement, la mort de quelque autre personne ou causera des sévices ou des dommages psychologiques graves à d'autres personnes,
>
> (ii) que, par la répétition continuelle de ses actes d'agression, notamment celui qui est à l'origine de l'infraction dont il est déclaré coupable, le délinquant démontre une indifférence marquée quant aux conséquences raisonnablement prévisibles que ses actes peuvent avoir sur autrui, ou

(iii) un comportement, chez ce délinquant, associé à la perpétration de l'infraction dont il vient d'être déclaré coupable, d'une nature si brutale que l'on ne peut s'empêcher de conclure qu'il y a peu de chance pour qu'à l'avenir ce comportement soit inhibé par les normes ordinaires de restriction du comportement, ou

(b) l'infraction perpétrée constitue un sévice grave à la personne, au terme de l'alinéa b) de la définition de cette expression à l'article 687, et que la conduite antérieure du délinquant dans le domaine sexuel, y compris lors de la perpétration de l'infraction dont il a été déclaré coupable, démontre son incapacité à contrôler ses impulsions sexuelles et laisse prévoir que vraisemblablement il causera à l'avenir de ce fait des sévices ou autres maux à d'autres personnes."

Lorsqu'elle a siégé à Kingston, en Ontario, la Commission a entendu un expert reconnu en matière de détermination de la dangerosité, M. Christopher Webster, du Centre de criminologie de l'Université de Toronto. M. Webster est un éminent psychologue dont tous ceux qui ont participé aux travaux de la Commission se sont accordés à reconnaître la valeur professionnelle.

Toujours à Kingston, nous avons également entendu le professeur Ronald R. Price, c.r., qui représentait plusieurs repris de justice. Professeur à la Faculté de droit de l'Université Queen's, M. Price a dirigé pendant de nombreuses années le Centre de droit correctionnel de cette faculté.

Ces deux personnes ont écrit d'excellents textes sur la détermination de l'état dangereux. Je pense tout spécialement à l'article intitulé "Psychiatry, Criminal Law Reform and the "Mythophilic' Impulse : On Canadian Proposals for the Control of the Dangerous Offender" qu'a publié le professeur Price dans (1970) 4 **Ottawa Law Review,** à la page 1. Quant à M. Webster, il a établi récemment, avec son collègue Bernard Dickens, un rapport intitulé **La détermination de l'état dangereux : Pour une nouvelle politique à l'égard des délinquants dangereux.** Ce rapport a été préparé pour le ministère de la Justice du Canada grâce au concours financier que celui-ci a accordé au Centre de criminologie de l'Université de Toronto.

Je ne veux nullement revenir ici sur tous les sujets qu'ont abordés dans leurs travaux ces grands spécialistes. Il conviendrait cependant de lire les textes que j'ai mentionnés en parallèle avec le présent rapport. Précisons toutefois que cela ne signifie pas que je me rallie à toutes les opinions qui y sont exprimées. Les points étudiés dans ces travaux sont complexes et débordent le cadre de mon mandat. Les documents en question sont néanmoins précieux pour ceux qui sont appelés à se pencher sur ce difficile domaine.

L'article de M. Price, écrit avant les modifications apportées au **Code criminel** en 1977, donne une bonne idée du dilemme auquel les législateurs, les juges, les commissions de libération conditionnelle et moi-même devons faire face lorsqu'il s'agit de prévoir la dangerosité, c'est-à-dire de veiller à protéger la population contre le délinquant véritablement dangereux tout en instituant des garanties propres à empêcher que des délinquants ne soient à tort déclarés dangereux. La question de la prévision de la violence a suscité récemment la publication de plusieurs articles scientifiques. Le Rapport Webster-Dickens en donne un résumé en son chapitre 2 (p. 16 à 22). Parmi les recherches résumées, mentionnons :

(a) l'étude du cas Baxstrom par Steadman et Cocozza 1;

(b) l'étude du cas Dixon 2;

(c) les études de Quinsey 3;

(d) l'étude de Kozol 4;

(e) l'étude de Cocozza sur la capacité mentale 5;

(f) les études du METFORS 6;

(g) l'étude de Muller et Reinehr 7;

Le Rapport Webster-Dickens examine en outre en profondeur, au chapitre 3 (p. 77 à 124), les problèmes juridiques auxquels donnent lieu les dispositions sur les délinquants dangereux. Il analyse entre autres la question de l'admissibilité et de la force probante des preuves en matière de prévision de l'état dangereux, et plus particulièrement du rôle du psychiatre comme témoin expert dans les procédures relatives à la détermination de l'état dangereux. Ce même chapitre analyse également le sujet du fardeau et de la nature de la preuve à faire dans ces procédures ainsi que l'incidence qu'est susceptible d'avoir la **Charte canadienne des droits et libertés** sur les dispositions considérées.

Les auteurs du Rapport Webster-Dickens résument les conclusions de celui-ci 8. J'estime qu'il est important de citer certains passages de ces conclusions :

> "Il n'est pas vraiment prouvé que les psychiatres et autres spécialistes de la

santé mentale sont en mesure de prévoir avec un certain degré de certitude le comportement éventuellement dangereux du malade et des détenus. Il en est ainsi aussi bien des prévisions s'appuyant sur des avis cliniques que de celles qui découlent de tests psychométriques. Le résultat des travaux antérieurs voulant que les personnes qui travaillent dans le domaine de la santé mentale surestiment dans leurs prévisions les comportements violents a récemment été confirmé à plusieurs reprises. Certes, ces études présentent de grosses lacunes, pour la plupart inévitables, au niveau de la méthode, mais l'ensemble des faits établis ne permet pas de faire confiance à ce genre de jugement psychiatrique et psychologique. On a avancé que les jugements cliniques pouvaient être bons à court terme lorsque l'évaluateur chargé de faire la prévision connaissait bien le cadre actuel ainsi que l'environnement physique et social immédiat de la personne concernée, cette affirmation n'étant pas toutefois étayée par des preuves abondantes. Il semble que les spécialistes de la santé mentale ne puissent apporter la preuve qu'ils sont en mesure de prévoir l'éventualité d'un comportement violent d'une personne donnée sur une période couvrant plusieurs années. Il est possible de remettre plus particulièrement en cause la capacité de prévision des cliniciens lorsque les détenus faisant l'objet d'une évaluation ne souffrent pas apparemment de troubles psychiatriques graves. Une étude à base d'entrevues spécialement destinées à recueillir l'opinion de 40 psychiatres médico-légaux, psychologues médico-légaux et criminologues canadiens nous montre que ces spécialistes se déclarent eux-mêmes largement impuissants à prévoir le comportement futur des délinquants dangereux du type concerné par la Partie XXI du **Code criminel** du Canada.

. . . .

Il est pratiquement impossible d'évaluer le potentiel de violence d'un détenu sans avoir pratiquement la mainmise sur les principaux facteurs liés à son environnement, au traitement et aux interventions biomédicales. Il faut bien savoir que dans le meilleur des cas, le clinicien ou le chercheur ne peuvent qu'évaluer approximativement l'éventualité d'un comportement violent. L'une des branches les plus prometteuses de la recherche aux États-Unis et au Canada porte sur "l'évaluation des risques". Cette méthode part à la base du principe que le mieux que l'on puisse obtenir, ce sont des prévisions s'appuyant sur un calcul de probabilités et s'efforce, avec un certain succès, de démontrer que certains éléments d'information faciles à obtenir offrent de bonnes possibilités de prévision. Ces différents éléments sont l'âge du sujet, le nombre de condamnations précédentes, le degré de la violence accompagnant le délit, etc. Il est vraisemblable, surtout lorsque l'on s'intéresse à une population pénale "non clinique", que ces prévisions seront plus précises que les prévisions cliniques et non le contraire. Malheureusement, il est peu probable que les principes tirés de cette approche apparemment détachée et "rationnelle" de la prise de décision plaisent au grand public qui croit, à tort, que la prise en compte par les tribunaux des jugements plus ou moins intuitifs des spécialistes de la santé mentale et des criminologues offre un maximum de protection.

. . . .

Outre les difficultés déjà notées que pose, d'après les publications récentes, la prévision des comportements violents, les procédures de la Partie XXI soulèvent un certain nombre de problèmes juridiques. Les dispositions de la Partie XXI permettent d'imposer une peine beaucoup plus sévère que celles que prévoient les autres articles du **Code criminel**. Le principal obstacle juridique à l'imposition d'une peine de durée indéterminée découle du fait que la procédure de la partie XXI repose sur le "témoignage" des psychiatres et autres spécialistes, dont les capacités en matière de prévision font actuellement l'objet de vives critiques.

. . . .

De fait, un représentant autorisé de la communauté scientifique la plus directement préoccupée par la prévision de la dangerosité, les psychiatres, a déclaré publiquement et officiellement que l'état actuel des connaissances en matière de prévision est si rudimentaire que les méthodes utilisées sont loin d'être au point et qu'elles donnent souvent des résultats faux. (Les soulignés sont de moi.) L'American Psychiatric Association (APA) a soumis dans une affaire de 1976 provenant de la Californie entendue par la Cour suprême (l'affaire **Tarasoff**) [9] et dans d'autres affaires, des mémoires à titre d'amicus curiae dans laquelle elle déclarait que les spécialistes de la santé mentale étaient incapables actuellement de faire des prévisions fiables en matière de violence et que ces spécialistes ont toujours tendance à surestimer le comportement dangereux.

Il semble qu'une telle déclaration devrait avoir des répercussions importantes sur le rôle des témoins experts lors des auditions concernant les délinquants dangereux. L'expérience américaine dans ce domaine semble toutefois indiquer le contraire. Dans une décision rendue en juillet 1983, dans une affaire concernant l'utilisation du témoignage de psychiatres pour la prévision de la dangerosité à long terme (arrêt **Barefoot**) [10], la Cour suprême des Etats-Unis n'a pas retenu la suggestion que l'APA faisait dans son mémoire, selon laquelle les psychiatres ne devraient pas pouvoir témoigner au sujet de la dangerosité future d'un accusé lors des auditions relatives à l'imposition de la peine capitale. Cette Cour a déclaré, dans son jugement majoritaire, qu'exclure les prévisions de ce genre faites par les psychiatres "reviendrait à nous demander d'oublier qu'on a inventé la roue".

. . . .

Dans le contexte canadien, les tribunaux ont eu tendance à apprécier la valeur des prévisions en matière de comportement futur selon leur mérite et, dans certains cas, à décider que le manque de fiabilité des prévisions des psychiatres porte sur la force probante de leur témoignage et non pas sur son admissibilité. Un tribunal ontarien a entendu dans une affaire récente concernant les délinquants dangereux, **(Morrison)** de nombreux témoignages au sujet du manque de fiabilité et de précision des prévisions des psychiatres en matière de dangerosité future. Le juge adjoint Mossop a déclaré que l'accusé était un délinquant dangereux au sens de la Partie XXI, dans un jugement qui s'attaquait à des problèmes fort complexes. Il a reconnu "la gravité des dangers que comporte la prévision des comportements", mais il a néanmoins déclaré que "lorsqu'ils sont saisis de ce genre de question, les tribunaux ne peuvent s'adresser qu'aux personnes qui ont des connaissances dans le domaine de la psychiatrie ..."

. . . .

Il y a plusieurs manières de répondre au problème que pose l'insuffisante fiabilité des prévisions à long terme effectuées par des psychiatres et autres spécialistes de la santé mentale à l'égard du danger que représente tel ou tel individu. On devrait considérer l'état dangereux de la même manière que la loi considère l'aliénation mentale c'est-à-dire qu'il s'agit d'une question de fait sur laquelle sera appelé à se prononcer un jury en tenant compte des instructions que le juge lui aura données sur le plan de la loi et en se fondant sur ses propres observations qui seront sans doute orientées mais non pas régies par les dépositions des experts psychiatres et autres. C'est la procédure actuellement utilisée pour enfermer, pour une période indéterminée, les personnes déclarées non coupables au motif de leur aliénation mentale et cette méthode pourrait également être retenue lorsqu'il s'agit d'enfermer pour une période indéterminée des personnes qui représentent un danger particulier pour la société. Ceci, certes, n'augmenterait pas la fiabilité des prévisions psychiatriques mais permettrait peut-être d'en réduire certains inconvénients en présentant l'ensemble des témoignages lors d'un débat contradictoire devant le jury.

Une autre solution consisterait à remplacer les commissions des libérations conditionnelles par un juge seul chargé des auditions sur la libération des délinquants dangereux. Les juges sont, sans doute, aussi conscients que les commissions des libérations conditionnelles du besoin de protéger l'ensemble des citoyens tout en préservant les droits et libertés des individus. Les juges restent libres de recevoir les opinions des experts qui exercent leur spécialité dans le cadre du système correctionnel tout en conservant le droit de décider dans quelle mesure ils vont utiliser les renseignements ainsi recueillis pour fonder leur décision.

. . . .

Tout le monde s'entend sur la nécessité de protéger les citoyens contre les individus dangereux mais la question est de savoir si les connaissances dont nous disposons à l'heure actuelle permettent d'assurer cette protection tout en garantissant les droits des contrevenants. A moins que le danger ne soit manifeste, comment imposer une peine supplémentaire à un individu pour des infractions qu'on lui impute à l'avance.

> Ceci semble de toute évidence injuste bien que l'imposition d'une peine supplémentaire permette dans certains cas d'éviter aux victimes en puissance le danger auquel les expose la personnalité même du délinquant en cause. Reconnaissant le caractère incomplet de nos connaissances nous devons chercher à améliorer la fiabilité de nos prévisions, accroître l'uniformité d'application des dispositions visant les contrevenants d'une même catégorie, surveiller de manière attentive l'équilibre entre un degré raisonnable de protection sociale et la perspective de liberté que peut raisonnablement entretenir un individu considéré comme dangereux."

Le rapport relève également des difficultés "assez évidentes" que suscite la prévision de l'état dangereux[11] :

> "1. La notion de "dangerosité" est à la fois obscure et difficile à définir; la notion elle-même signifie différentes choses pour différentes personnes à différents moments.
>
> 2. L'analyse expérimentale de groupes choisis de manière aléatoire est dans une large mesure impossible; il est rare que l'on ait vraiment la possibilité de poursuivre des "expériences naturelles".
>
> 3. Les comportements très dangereux sont rares; il est difficile de prévoir des phénomènes dont la fréquence est si faible.
>
> 4. Les populations "dangereuses" ayant fait l'objet d'une étude proviennent d'efforts localisés d'évaluation et de traitement; il s'ensuit qu'il est difficile de comparer entre les échantillons faisant l'objet de différentes études.
>
> 5. En dépit de quelques tentatives isolées de définition des comportements "psychopathes" ou du "dérangement de la

personnalité", généralement en termes généraux et plus ou moins de tous les jours, il n'existe pas de nomenclature psychiatrique appropriée qui s'applique aux personnes agissant constamment et régulièrement de manière agressive; de même que l'on ne peut pas compter sur de véritables instruments psychométriques appropriés à la tâche qui nous occupe.

6. Il est difficile de parvenir à des critères de mesure exacte et exhaustive des comportements violents au cours de la période d'étude des sujets pour des raisons pratiques et éthiques diverses; lorsqu'on parvient à les recueillir, il peut être difficile de coordonner les données en provenance de deux milieux bien différents : celui de la santé mentale et celui de la justice pénale.

7. Il y a absence de correspondance entre les décisions judiciaires et les décisions cliniques; le droit exige souvent que l'on réponde par oui ou par non à des questions qui relèvent davantage du domaine des probabilités.

8. Les avis cliniques sont d'ordinaire difficiles à évaluer parce que, lorsqu'ils sont acceptés, ce qui arrive plus fréquemment que le contraire, on ne peut en contrôler la validité; si le sujet concerné est jugé dangereux, il sera vraisemblablement placé sous bonne garde, la validité de la prévision ne pouvant donc plus être contrôlée.

9. Certaines évaluations cliniques sont tirées d'échantillons de comportement très réduits et quelques cliniciens ne semblent pas avoir conscience du fait que, selon toute probabilité, un examen approfondi en personne constitue un élément essentiel du processus d'évaluation.

10. Bien que certains éléments du comportement puissent être mesurés avec une grande exactitude, ils ne présentent pas toujours un très grand intérêt sur le plan des prévisions; ce qui est exact n'est pas toujours important.

> 11. Lors de l'évaluation, le détenu peut avoir un comportement très différent de la normale; il peut être utile pour lui d'adopter un comportement sortant de l'ordinaire et l'évaluation clinique peut en être totalement faussée.
>
> 12. Il est faux de partir du principe qu'un clinicien doit être en mesure de donner une opinion toujours valide, quelles que soient les circonstances; on peut raisonnablement penser qu'il pourra être plus confiant dans certains cas que dans d'autres."

Au cours de la présente enquête, j'ai pu prendre connaissance des rapports psychologiques et psychiatriques versés au dossier des détenus en cause. J'ai en outre, dans certains cas, entendu le témoignage de psychiatres ou de psychologues. Enfin, l'on m'a soumis les rapports détaillés sur le comportement, en détention aussi bien qu'en liberté sous condition, de chacun des repris de justice considérés, en plus d'entendre le témoignage d'agents de libération conditionnelle, de responsables de quartiers de détention ainsi que de diverses autres personnes qui ont des rapports quotidiens avec ces individus.

Lorsqu'il a comparu devant nous à Kingston, M. Webster a déclaré que les informations que de telles personnes sont susceptibles de nous fournir présentent souvent, lorsqu'il s'agit de prévoir l'état dangereux, autant d'intérêt qu'une évaluation effectuée par un psychiatre ou un psychologue, puisque les personnes considérées ont eu l'occasion d'observer le repris de justice sur une longue période, dans toutes sortes de situations.

Je voudrais livrer ici quelques observations sur les dangers du recours aux rapports psychiatriques ou psychologiques dans l'analyse de ces cas. En effet, j'ai pu constater qu'un rapport psychologique ou psychiatrique défavorable entraîne presque toujours le rejet par la Commission nationale des libérations conditionnelles de la demande de libération conditionnelle que lui présente un repris de justice. Malgré la controverse qui existe dans les milieux spécialisés au sujet de la valeur qu'il convient d'accorder à l'opinion des experts sur la dangerosité, il ne me semble pas étonnant que ceux à qui il revient de déterminer si un individu doit ou non être remis en liberté se fondent aussi largement sur cette source d'information. Cela ne veut cependant pas dire qu'il n'est jamais passé outre aux résultats des expertises psychologiques ou psychiatriques. Toutefois, il n'en est généralement ainsi que si le détenu fournit lui-même une contre-expertise psychologique ou psychiatrique qui plaide en sa faveur.

Ce qui nous amène à un problème très grave que j'ai relevé au cours de l'étude de ces cas. En effet, il est apparu que le repris de justice dont le dossier est examiné par la Commission nationale des libérations conditionnelles ne bénéficie pas du droit d'obtenir communication des renseignements psychologiques, psychiatriques ou médicaux dont il sera tenu compte pour statuer sur son cas. La Commission a pour principe de considérer ces informations comme confidentielles et de ne pas les divulguer au détenu. Cette façon de procéder m'apparaît hautement critiquable. Il découle en effet de l'obligation de traiter équitablement le détenu que ce dernier devrait être informé de tous les éléments de nature à amener la Commission à rejeter sa demande de libération conditionnelle, à moins que n'existent de justes motifs de ne pas divulguer ces renseignements (à titre d'exemple, lorsqu'il s'agit d'informations fournies par un informateur ou obtenues à l'occasion d'une enquête criminelle toujours en cours).

La présente Commission d'enquête a mis à la disposition des intéressés tous les documents ou renseignements les concernant, à l'exception de ceux entrant dans les exceptions que je viens tout juste de mentionner. Admis pour la première fois à prendre connaissance des rapports psychiatriques ou psychologiques qui étaient défavorables, le repris de justice pouvait, par des témoignages d'experts ou de non-experts, tenter de les réfuter. Dans bon nombre de cas, ils sont d'ailleurs parvenus à démontrer l'inexactitude des expertises psychiatriques ou psychologiques contestées. Il est même arrivé que les auteurs de celles-ci, après avoir entendu d'autres témoignages devant la Commission d'enquête, émettent une opinion plus favorable sur le repris de justice dont il s'agissait.

L'enquête avait également permis de découvrir que l'évaluation psychologique avait parfois été effectuée par des moyens inadéquats et que c'est par extrapolation des résultats de cette évaluation que l'on avait conclu à l'existence d'un état dangereux. Lorsque les examens psychologiques plus appropriés furent effectués, il ne fut plus possible d'affirmer qu'il y avait dangerosité.

L'enquête a d'autre part noté que l'on avait, dans certains cas, fait dire à l'expertise psychiatrique ou psychologique ce qu'elle ne disait pas. L'interrogatoire des experts a en effet démontré que le libellé de leur rapport était trompeur et aurait été injustement préjudiciable à la personne qui en faisait l'objet si les experts n'avaient pas été amenés à préciser leur pensée.

Après avoir exposé les difficultés auxquelles j'ai dû faire face pour déterminer si les repris de justice dont j'ai étudié le cas constituaient un danger pour la société, je m'en voudrais de passer sous silence la lourde tâche des membres de la Commission nationale des libérations conditionnelles, qui doivent trancher jour après jour une semblable question. Même si j'ai critiqué sur certains points la procédure suivie pour déterminer s'il y a lieu d'accorder une libération conditionnelle, je tiens à souligner que l'étude de ces dossiers m'a permis de constater que la Commission s'acquitte consciencieusement de sa mission.

J'estime personnellement que le système judiciaire aussi bien que celui des libérations conditionnelles a jusqu'à maintenant surestimé la capacité des psychiatres et des psychologues de prévoir la dangerosité.

Pour apprécier les cas qui nous intéressent, je me suis fondé non seulement sur les critères énoncés à la Partie XXI du **Code criminel**, mais aussi sur le bon sens. J'estime que rien ne permet mieux de se prononcer sur la dangerosité d'une personne que le comportement passé de celle-ci. La Commission d'enquête s'est donc particulièrement attachée à connaître les antécédents de chacun des repris de justice, afin de voir si ceux-ci ne révèlent pas l'existence d'un danger.

Les experts s'entendent pour reconnaître que la dangerosité et la propension au crime d'une personne diminuent au fur et à mesure qu'une personne vieillit ou que ses capacités physiques faiblissent. Je me suis donc beaucoup intéressé à l'incidence que le vieillisement avait eue sur l'attitude et sur le comportement des individus en cause. En troisième lieu, j'ai aussi accordé une valeur particulière aux facteurs externes ayant influencé le comportement, tels que la drogue, l'alcool ou les troubles mentaux, afin de voir si l'intéressé était parvenu à surmonter ses problèmes dans les domaines en question.

Il importe de noter que bon nombre des repris de justice sont alcooliques. Cette maladie explique en grande partie leurs incessants démêlés avec la justice. En effet, il est fréquemment fait interdiction au libéré conditionnel de consommer de l'alcool. Si plusieurs repris de justice ont réussi à respecter cette obligation et à traverser sans incident leur période de libération conditionnelle, nombreux sont ceux qui n'y sont pas parvenus. Ces derniers se sont tôt ou tard retrouvés en prison par suite de la révocation de leur libération conditionnelle.

Et si les conditions mises à la libération conditionnelle des repris de justice visent à éviter que le comportement de ceux-ci mette la population en danger, une obligation de sobriété est tout à fait indiquée si l'intéressé est connu pour commettre des actes dangereux ou susceptibles de l'être lorsqu'il a consommé de l'alcool. Or, tel n'était pas le cas de plusieurs des repris de justice auxquels une telle obligation avait été imposée. Il ressortait en effet de leur dossier qu'ils avaient surtout tendance à commettre des infractions pénales mineures, tel que le vol à l'étalage, lorsqu'ils se trouvaient sous l'influence de l'alcool.

Il est d'autant plus difficile de régler la situation de ces individus que le régime des libérations conditionnelles au moyen duquel l'on cherche à régir leur comportement n'est pas adapté aux alcooliques chroniques. La Commission d'enquête a visité un établissement de Vancouver qui s'occupe de venir en aide aux alcooliques chroniques. Bon nombre des pensionnaires de cet établissement ont commis le même genre d'infractions pénales mineures que celles dont s'étaient rendus coupables les repris de justice qui souffraient d'alcoolisme chronique. Les conséquences de tels incidents sont toutefois radicalement différentes dans le cas du repris de justice, puisqu'elles sont susceptibles d'entraîner dans son cas la réincarcération dans un pénitencier.

Le cas d'un repris de justice de la région des Prairies illustre assez bien le problème que pose aux autorités l'alcoolique chronique. Il s'agit d'un repris de justice qui avait été libéré sous la condition de revenir chaque soir à un centre correctionnel communautaire. Une des obligations auxquelles il était astreint, était de "ne consommer aucune boisson alcoolique". Très peu de temps après son élargissement, il apparut que l'intéressé, qui souffrait d'alcoolisme chronique, ne respectait pas cette obligation. Les autorités en charge du centre correctionnel communautaire firent preuve de beaucoup de patience et de mansuétude. L'intéressé fut trouvé ivre à de nombreuses reprises sur une période de plusieurs mois. Aucun de ces incidents n'avait cependant donné lieu à une violation du droit pénal ou n'avait créé de risques pour les personnes ou pour les biens. Cela n'en préoccupa toutefois pas moins le personnel du centre correctionnel. Celui-ci craignait en effet les conséquences que pourrait avoir la tolérance dont il faisait preuve dans ce cas sur les autres pensionnaires du centre qui, eux, pouvaient devenir dangereux lorsqu'ils avaient consommé de l'alcool. Le comportement du repris de justice en cause plaça le personnel du centre dans la position intenable d'exiger de certains le strict respect de l'obligation d'abstinence tout en tolérant chez d'autres la violation de cette même obligation.

Dans ces circonstances, il devenait inévitable que le repris de justice en question soit, à plus ou moins long terme, réincarcéré. Dans le cas qui nous intéresse, cette situation ne cessa d'ailleurs de se répéter. À cause de son incapacité à respecter les obligations des libérations conditionnelles, l'intéressé, bien qu'il n'eût commis aucune nouvelle infraction, exécuta de très longues peines d'emprisonnement.

Une personne comme le repris de justice considéré pourrait sans doute rester hors de la voie du crime si elle était placée dans un établissement pour alcooliques chroniques plutôt que dans une institution pour criminels. Malheureusement, de telles institutions sont rares et, lorsqu'elles existent, il est difficile d'y faire entrer des repris de justice.

Mon opinion sur la dangerosité de chacun des repris de justice est énoncée dans l'analyse individuelle dont il fait l'objet. Le présent chapitre visait à exposer la façon dont j'ai abordé cette analyse.

NOTES - CHAPITRE 3

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1 Steadman and Cocozza, **Careers of the Criminally Insane: Excessive Control as Social Deviance** (Lexington Mass. : D.C. Heath, 1974). Voir aussi Cocozza and Steadman "Some Refinements in the Measurement and Prediction of Dangerous Behaviour", 131 **Am. J. Psychiat.** 1012 (1974).

2 Thornberry and Jocoby, **The Criminally Insane : A Community Follow-up of Mentally Ill Offenders** (Chicago: University of Chicage Press, 1979).

3 The Quinsey, Warneford, Pruesse and Link, "Released Oakridge Patients : A Follow-up Study of Review Board Discharges", 15 **Brit J. Crim.** 264 (1975). Voir aussi Quinsey, Pruesse and Fernley, "Oakridge Patients: Pre-Release CHaracteristics and Post-Release Adjustment", 3 **Psychiatry & Law** 63 (1975); Quinsey, Pruesse and Fernley, "A Follow-up of Patients Found Unfit to Stand Trial or Not Guilty Because of Insanity", 20 **Canada Psychiat. Assoc.** J. 461 (1975); Pruesse and Quinsey, "The Dangerousness of Patients Released From Maximum Security : Replication" 3 J. **Psychiat. and Law** 293 (1977).

4 Kozol, Boucher and Garofalo, "The Diagnosis and Treatment of Dangerousness" 18 **Crime and Deliquency** 371 (1972).

5 Cocozza and Steadman, "The Failure of Psychiatric Predictions of Dangerousness : Clear and Convincing Evidence", 29 Rutgers L.R. 1084 (1976).

6 Voir Kigewski, METFORS **Working Paper in Forensic Psychiatry** No. 28 (1981) and Sepejak Menzies, Webster and Jensen "Medical Prediction of Dangerousness, 2-Year Follow-up of 408 Pre-Trial Forensic Cases", 11 **Bull. Am. Acad. Psychiat. and Law** 177 (1983); Voir aussi, Menzies, Webster and Sepejak "The Dimensions of Dangerousness: Evaluating the Psychiatrict Predictions of Violence Among Forensic Patients", **Law and Human Behavior,** In Press; et Menzies, Webster and Sepejak "Hitting the Forensic Sound Barrier : Predictions of Dangerousness in a Pre-Trial Clinic" in Webster, Ben-Aron and Huckler (eds.), In Press, Chapter 1.

7 Muller and Reinehr "Predicting Dangerousness of Maximum Security Forensic Mental Patients", 10 J. **Psychiat. and Law** 223 (1982).

8 Voir le résumé, p. xii à xx.

9 **Tarasoff v. Regents of the University of California** (1976) 551 B. 2d 334, où la défense opposée à une réclamation formée par les parents de la victime contre l'Université de la Californie pour défaut d'avertissement était l'impossibilité de prévoir scientifiquement la dangerosité.

10 Barefoot (1980) 596 S.W. ed 875 **(Text. Crim App.)**.

11 Aux pages 22 à 24 du rapport.

CHAPITRE 4

POSSIBILITE DE RECOURIR AU POUVOIR DE PARDON

A. GÉNÉRALITÉS

La Commission d'enquête a notamment pour mandat de :

> "Déterminer et recommander au ministre de la Justice et au solliciteur général du Canada le mécanisme le plus approprié et le plus rapide pour effectuer des remises de peine s'il y a lieu."

Il appartient donc à la Commission d'enquête d'étudier les différents moyens de mettre fin à la détention préventive des repris de justice relativement auxquels elle estime qu'une telle mesure est indiquée.

Avant d'examiner les divers mécanismes susceptibles d'être utilisés pour mettre fin à la détention des repris de justice en cause, je voudrais donner un bref aperçu des méthodes qui ont été utilisées à cette fin jusqu'à maintenant. Antérieurement à l'adoption de la **Loi de 1977 modifiant le droit pénal** (1976-77, chap. 53, art. 14), l'article 694 du **Code criminel** disposait que :

> "Révision par la Commission nationale des libérations conditionnelles
>
> 694. Lorsqu'une personne est sous garde en vertu d'une sentence de détention préventive, la Commission nationale des libérations conditionnelles doit, au moins une fois par année, examiner l'état de santé, les antécédents et la situation de cette personne en vue de décider si on devrait lui accorder la libération conditionnelle en vertu de la **Loi sur la libération conditionnelle de détenus**, et dans l'affirmative à quelles conditions."

La **Loi de 1977 modifiant le droit pénal** a abrogé ce qui constituait la Partie XXI du **Code** et a remplacé l'article 694 par un article 695.1 ainsi rédigé :

> 695.1(1) Sous réserve du paragraphe (2), la Commission nationale des libérations conditionnelles doit examiner les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée dès l'expiration d'un délai de trois ans à compter du jour où ces personnes ont été mises sous garde et, par la suite, tous les deux ans au plus tard, afin d'établir s'il y a lieu de les libérer conformément à la **Loi sur la libération conditionnelle de détenus** et, dans l'affirmative, à quelles conditions.
>
> (2) La Commission nationale des libérations conditionnelles doit, au moins un fois par an, examiner les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée imposée avant l'entrée en vigueur de la **Loi de 1977 modifiant le droit pénal** afin d'établir s'il y a lieu de les libérer conformément à la **Loi sur la libération conditionnelle de détenus** et, dans l'affirmative, à quelles conditions."

L'article 15 de la **Loi de 1977 modifiant le droit pénal** contenait d'autre part les dispositions transitoires suivantes :

> 15.(2) Les articles 693 à 695 du **Code criminel**, édictés par l'article 14, s'appliquent aux personnes condamnées, avant l'entrée en vigueur de cet article, à la détention préventive en vertu de la Partie XXI du **Code criminel** comme si les renvois à l'expression "sentence de détention dans un pénitencier pour une période indéterminée" étaient des renvois à l'expression "sentence de détention préventive".

Il en résulte que le repris de justice est soumis, pour la libération conditionnelle, au régime de l'article 10 de la **Loi sur la libération conditionnelle de détenus.** Ce même article autorise du reste la Commission des libérations conditionnelles à révoquer la libération conditionnelle accordée. L'article 10 prévoit que :

> "Pouvoirs de la Commission
>
> 10. (1) La Commission peut
>
> a) accorder la libération conditionnelle à un détenu, sous réserve des modalités qu'elle juge opportunes, si la Commission considère que
>
> (i) dans le cas d'un octroi de libération conditionnelle autre qu'une libération conditionnelle de jour, le détenu a tiré le plus grand avantage possible de l'emprisonnement,
>
> (ii) l'octroi de la libération conditionnelle facilitera le redressement et la réhabilitation du détenu, et
>
> (iii) la mise en liberté du détenu sous libération conditionnelle ne constitue pas un risque indu pour la société;
>
> . . . .

> d) relever des obligations de la libération conditionnelle tout détenu à liberté conditionnelle, sauf un détenu en libération conditionnelle de jour ou un détenu à liberté conditionnelle qui a été condamné à la peine de mort ou à un emprisonnement à vie comme peine minimum; et
>
> e) à sa discrétion, révoquer la libération conditionnelle de tout détenu à liberté conditionnelle autre qu'un détenu à liberté conditionnelle qui a été relevé des obligations de la libération conditionnelle, ou révoquer la libération conditionnelle de toute personne qui est sous garde en conformité d'un mandat délivré en vertu de l'article 16 nonobstant l'expiration de sa condamnation."

Pour déterminer si "la mise en liberté du détenu sous libération conditionnelle ne constitue pas un risque indu pour la société", la Commission des libérations conditionnelles interprète la notion de risque pour la société comme la probabilité d'une récidive. Elle ne distingue donc pas entre les infractions comportant des sévices graves à la personne et les autres genres d'infractions. Pas davantage ne fait-elle la différence entre le repris de justice qui est simplement une nuisance et celui qui constitue une menace pour la société, contrairement à ce qu'a fait la Cour suprême du Canada dans l'affaire **Hatchwell c. La Reine** [1].

Au surplus, la Commission des libérations conditionnelles conserve la faculté de révoquer la libération conditionnelle accordée au repris de justice si elle estime que la conduite de celui-ci viole les obligations qui lui ont été imposées lors de sa libération ou permet de redouter qu'il ne commette une nouvelle infraction, que cette dernière soit grave ou non.

Du fait de l'optique retenue par la Commission des libérations conditionnelles, il y a eu dans bien des cas réincarcération de repris de justice qui, bien que ne pouvant être considérés comme dangereux au sens de la Partie XXI du **Code criminel** ou selon tout autre critère de dangerosité, risquaient cependant de commettre des infractions qui n'étaient pas de nature à mettre en danger la sécurité d'autrui. C'est d'ailleurs cette situation ainsi que les longues peines d'emprisonnement auxquelles elle a donné lieu qui ont amené la création de la présente Commission d'enquête.

Avant d'en arriver aux mécanismes qui conviendraient le mieux pour élargir rapidement les repris de justice à l'égard desquels une telle mesure est opportune, je tiens toutefois à souligner que l'actuel régime des libérations conditionnelles ne convient nullement pour remettre en liberté le repris de justice non dangereux. Examinons maintenant les autres formes possibles de remise en liberté.

Bon nombre des problèmes relevés pourraient être corrigés par une intervention législative, mais cela exigerait beaucoup de temps. La législation ne peut en effet être adaptée aux nombreux cas particuliers que nous avons étudiés. Si l'on ne disposait d'aucune autre solution de rechange, il faudrait soit adopter des dispositions législatives permettant de mettre fin à la détention préventive des repris de justice qui ne représentent aucun danger pour la société, soit amener les repris de justice à recourir à l'**habeas corpus**, comme dans l'affaire **Mitchell** 2, afin d'obtenir leur libération, dans la mesure où les conditions posées dans cette affaire sont réunies.

J'estime cependant qu'il existe un moyen plus souple pour libérer les repris de justice qui le méritent. Ce moyen, c'est le pouvoir de pardon, et le reste du présent chapitre sera consacré à l'examen de celui-ci.

Les audiences que la Commission d'enquête a tenues partout au Canada lui ont permis d'apprendre que de nombreux repris de justice ont fait appel au pouvoir de pardon pour tenter d'obtenir la levée de leur qualification de repris de justice ainsi que de la détention préventive dont ils faisaient l'objet. Il leur a toujours été répondu qu'il était impossible d'utiliser dans leur cas le pouvoir de pardon. Dans les régions du Pacifique et de l'Atlantique, les autorités de la Commission des libérations conditionnelles ont décidé que celle-ci pouvait, en vertu des pouvoirs qu'elle tient du paragraphe 10.1d) de la **Loi sur la libération conditionnelle de détenus**, relever un repris de justice des obligations de la libération conditionnelle. En revanche, dans d'autres régions, les responsables de la Commission des libérations conditionnelles estiment que le repris de justice ne peut bénéficier de telles mesures. Dans ces régions, le repris de justice est, semble-t-il, considéré comme "un détenu en liberté conditionnelle qui a été condamné (...) à un emprisonnement à vie constituant une peine minimum", et ne pouvant à ce titre être relevé des obligations de la libération conditionnelle.

Or aucune politique de la Commission nationale des libérations conditionnelles n'empêche de relever les repris de justice des obligations de la libération conditionnelle. Il est ressorti des audiences de la Commission d'enquête que, n'eût été cette conviction erronée, bon nombre des repris de justice libérés sous condition ayant eu une bonne conduite pendant une période souvent passablement longue, auraient pu bénéficier d'un examen de leur cas en vue d'être relevés des obligations de la libération conditionnelle.

Les dispositions du paragraphe 10(1)e) de la **Loi sur la libération conditionnelle de détenus** interdisent à la Commission des libérations conditionnelles de révoquer la libération conditionnelle du libéré sous condition qui a été relevé des obligation de la libération conditionnelle. Le repris de justice relevé des obligations de la libération conditionnelle se retrouvait donc dans une situation étrange. En effet, il conserverait la qualité de "repris de justice" et resterait sous le coup d'une condamnation à la détention préventive, tout en ne pouvant être réincarcéré en vertu de cette condamnation du fait qu'il est interdit à la Commission des libérations conditionnelles de révoquer la libération conditionnelle lorsqu'elle a accordé la levée des obligations de celle-ci.

Dans les faits, cette bizarrerie juridique n'a cependant créé aucun problème, puisque tous les repris de justice qui ont été relevés des obligations de la libération conditionnelle vivent dans le respect des lois. Tous ceux qui ont bénéficié de cette mesure ont toutefois demandé à la Commission d'enquête de prendre des dispositions pour qu'ils cessent d'être soumis à cette qualification infamante de "repris de justice". Bon nombre d'entre eux ont sollicité un pardon, mais se sont fait répondre qu'ils ne pouvaient être admis au bénéfice d'une telle mesure. Nous verrons maintenant dans quelle mesure il est possible de recourir au pardon pour rendre, lorsqu'il y a lieu, la liberté aux repris de justice.

B. POUVOIR DE PARDON

1. Dispositions législatives ou autres relatives au pardon

Il convient d'énoncer tout d'abord les dispositions qui touchent directement au pouvoir de pardon et en régissent l'utilisation.

Les articles 683 à 686 du **Code criminel** prévoient ce qui suit :

> "Pardon
>
> À qui le pardon peut être accordé - Pardon absolu ou conditionnel - Effet du pardon absolu - N'atteint pas la peine pour infraction subséquente - Remise par le gouverneur en conseil - Conditions de la remise.
>
> 683. (1) Sa Majesté peut accorder la clémence royale à une personne condamnée à l'emprisonnement sous l'autorité d'une loi du Parlement du Canada, même si cette personne est emprisonnée pour omission de payer des deniers à une autre personne.
>
> (2) Le gouverneur en conseil peut accorder un pardon absolu ou un pardon conditionnel à toute personne déclarée coupable d'une infraction.
>
> (3) Lorsque le gouverneur en conseil accorde un pardon absolu à une personne, celle-ci est par la suite réputée n'avoir jamais commis l'infraction à l'égard de laquelle le pardon est accordé.
>
> (4) Aucun pardon absolu ou conditionnel n'empêche ni ne mitige la punition à laquelle la personne en cause pourrait autrement être légalement condamnée sur une déclaration de

> culpabilité subséquente pour une infraction autre que celle concernant laquelle le pardon a été accordé.
>
> . . . .
>
> 685. (1) Le gouverneur en conseil peut ordonner la remise intégrale ou partielle d'une peine pécuniaire, d'une amende ou d'une confiscation imposée en vertu d'une loi du Parlement du Canada, quelle que soit la personne à qui elle est payable ou la manière de la recouvrer.
>
> (2) Une ordonnance portant remise aux termes du paragraphe (1) peut comprendre la remise de frais subis dans les procédures mais on ne doit remettre aucuns frais auxquels un poursuivant privé a droit.
>
> Prérogative royale
>
> 686. Rien dans la présente loi ne limite ni n'atteint, de quelque manière, la prérogative royale de clémence que possède Sa Majesté."

La **Loi sur le casier judiciaire** 3 dispose, quant à elle, que:

> "DEMANDE DE PARDON
>
> 3. Une personne déclarée coupable d'une infraction en vertu d'une loi du Parlement du Canada ou d'un règlement qui en découle peut présenter une demande de pardon à l'égard de cette infraction.
>
> PROCEDURE
>
> Production de la demande - Enquête et rapport par la Commission - Calcul de la durée de la peine - Rapport de la Commission - Octroi du pardon.
>
> 4. (1) Une demande de pardon doit être adressée au Ministre qui la transmet à la Commission.

(2) La Commission doit faire effectuer une enquête suffisante pour connaître la conduite du requérant depuis la date de sa condamnation, mais il ne peut être procédé à une telle enquête,

a) lorsque le requérant a été déclaré coupable d'une infraction punissable sur déclaration sommaire de culpabilité à la suite de procédures engagées en vertu de la Partie XXIV du **Code criminel**, au cas où le requérant s'est vu infliger

(i) une peine d'emprisonnement,

(ii) une période de probation, ou

(iii) une amende,

avant que deux années ne se soient écoulées depuis l'expiration de la peine d'emprisonnement ou de la période de probation ou le paiement de l'amende, selon le cas; ou si le requérant s'est vu infliger

(iv) une période de probation en plus d'une peine d'emprisonnement,

(v) une période de probation en plus d'une amende, ou

(vi) une amende en plus d'une peine d'emprisonnement,

avant que deux années ne se soient écoulées depuis l'expiration de la peine d'emprisonnement ou de la période de probation ou le paiement de l'amende, selon le cas, en prenant celui de ces événements qui s'est produit le dernier; ou

b) dans tout autre cas, avant que cinq années ne se soient écoulées depuis la date à partir de laquelle le délai de deux ans visé à l'alinéa a) aurait été calculé si cet alinéa avait été applicable au requérant.

(3) Aux fins du présent article, il faut inclure, dans le calcul de la durée d'une peine d'emprisonnement infligée à un requérant, en plus du temps qu'il a passé en prison à cause de cette peine, toute période de réduction statutaire qui lui a été accordée relativement à cette peine.

(4) À la fin de son enquête, la Commission doit faire part de ses résultats au Ministre, ainsi que de sa recommandation sur l'opportunité de l'octroi d'un pardon; toutefois, si la Commission se propose de recommander qu'un pardon ne soit pas octroyé, elle doit, avant de faire cette recommandation, en aviser immédiatement le requérant et l'informer qu'il a le droit de présenter à la Commission toutes observations qu'il estime pertinentes. La Commission doit alors examiner toutes observations orales ou écrites qui lui sont présentées par le requérant ou pour son compte dans un délai raisonnable après qu'un tel avis a été donné et avant qu'un rapport ait été fait en vertu du présent paragraphe.

(5) Au reçu d'une recommandation de la Commission préconisant l'octroi du pardon, le Ministre doit transmettre ladite recommandation au gouverneur en conseil qui peut accorder le pardon; celui-ci doit être rédigé selon la formule indiquée à l'annexe.

EFFET DE L'OCTROI DU PARDON

Effet de l'octroi

5. L'octroi d'un pardon

a) est la preuve du fait que la Commission, après avoir effectué une enquête suffisante, est convaincue que le requérant a eu une bonne conduite et que la condamnation à l'égard de laquelle le pardon est accordé ne devrait plus nuire à sa réputation; et

b) à moins que le pardon ne soit révoqué par la suite, annule la condamnation pour laquelle il est accordé et, sans restreindre la portée générale de ce qui précède, élimine toute déchéance que cette condamnation entraîne, pour la personne ainsi déclarée coupable, en vertu de toute loi du Parlement du Canada ou d'un règlement établi sous son régime.

. . .

RÉVOCATION

Révocation du pardon

7. Un pardon peut être révoqué par le gouverneur en conseil

a) si la personne à laquelle il est accordé est par la suite déclarée coupable d'une nouvelle infraction en vertu d'une loi du Parlement du Canada ou d'un règlement qui en découle; ou

b) sur preuve établissant, à la satisfaction du gouverneur en conseil,

(i) que la personne à laquelle il a été accordé a cessé de se bien conduire, ou

(ii) que cette personne a sciemment fait une déclaration inexacte ou trompeuse relativement à sa demande de pardon, ou a sciemment dissimulé un détail important relativement à cette demande.

> Réserve
>
> 9. Rien dans la présente loi ne limite ni n'affecte en aucune façon les dispositions relatives au pardon du **Code criminel** ou des lettres patentes créant le poste de gouverneur général du Canada, sauf que les articles 6 et 8 s'appliquent à l'égard de tout pardon octroyé avant ou après l'entrée en vigueur de la présente loi conformément à tout pouvoir conféré par ces dispositions."

2. Les Lettres patentes constituant la charge de gouverneur général du Canada [4]

Le paragraphe II des **Lettres patentes constituant la charge de gouverneur général du Canada** prévoit ce qui suit:

> "Et, par les présentes, Nous autorisons Notre gouverneur général, sur l'avis de Notre Conseil Privé pour le Canada, ou de tous membres dudit Conseil ou individuellement, selon l'exigence du cas, à exercer tous les pouvoirs et attributions dont Nous sommes validement investi à l'égard du Canada, et, pour plus de certitude, mais sans restreindre la portée générale de ce qui précède, à faire et exécuter, de la manière susdite, tout ce qui peut ressortir à sa charge et à la confiance que nous avons mise en lui en conformité des divers pouvoirs et attributions qui lui ont été accordés ou destinés en vertu des Actes de l'Amérique du Nord britannique, de 1867 à 1946, et des pouvoirs et attributions ci-après conférés par les présentes lettres patentes et dans toute commission qui pourra lui être décernée sous Notre Grand Sceau du Canada et sous le régime des lois qui sont ou pourront être en vigueur au Canada."

Le paragraphe XII de ces mêmes lettres patentes est pour sa part ainsi conçu :

> "Et Nous autorisons en outre Notre gouverneur général, selon qu'il le jugera opportun, en Notre nom et pour Nous, lorsqu'un crime ou une infraction aux lois du Canada a été commise pour laquelle le délinquant peut subir un procès en vertu desdites lois, à gracier tout complice, à l'égard de ce crime ou de cette infraction, qui fournira des renseignements pouvant amener la condamnation du délinquant principal, ou de l'un quelconque de ces délinquants, s'il y en a plusieurs; et de plus à accorder à tout délinquant déclaré coupable de tel crime ou infraction devant n'importe quel tribunal, ou devant n'importe quel juge, juge de paix ou magistrat administrant les lois du Canada, un pardon, soit libre, soit sujet à des conditions licites, ou un sursis à l'exécution de la sentence de ce délinquant, pendant la période que Notre gouverneur général pourra juger pertinente, et à faire remise de toute amende, peine ou confiscation qui peut Nous devenir due et payable. Et Nous mandons et ordonnons que Notre gouverneur général n'accorde aucune grâce ni aucun sursis à un tel délinquant sans avoir préalablement obtenu, dans les cas de peine de mort, l'avis de Notre Conseil privé pour le Canada et, dans d'autres cas, l'avis d'au moins un de ses ministres."

L'article 22 de la **Loi sur la libération conditionnelle de détenus** prévoit ce qui suit :

> "JURIDICTION ADDITIONNELLE
>
> Clémence
>
> 22.(2) Lorsque le solliciteur général du Canada le lui ordonne, la Commission procède aux investigations ou à l'enquête qu'il peut désirer en ce qui concerne une demande, à lui faite, en vue de l'exercice de la prérogative royale de clémence."

La **Loi d'interprétation** 5, en son article 16, dispose enfin que :

> "SA MAJESTE
>
> Sauf dans la mesure déclarée, Sa Majesté n'est ni liée ni visée
>
> 16. Nul texte législatif de quelque façon que ce soit ne lie Sa Majesté ni n'a d'effet à l'égard de Sa Majesté ou sur les droits et prérogatives de Sa Majesté, sauf dans la mesure y mentionnée ou prévue."

Il résulte de ce qui précède que le pouvoir de pardon découle des différentes sources suivantes :

a) les dispositions de l'article 683 du **Code criminel;**

b) les dispositions de la **Loi sur le casier judiciaire;**

c) les pouvoirs conférés au gouverneur général par le paragraphe XII des **Lettres patentes;**

d) les pouvoirs généraux attribués au gouverneur général par le paragraphe II des **Lettres patentes;**

e) et de tout pouvoir traditionnellement dévolu à Sa Majesté en vertu de la prérogative royale de clémence, que ce pouvoir ait été ou non conféré au gouverneur général par les **Lettres patentes.**

Il est à mon sens inutile d'analyser plus à fond le pouvoir de pardon prévu dans la **Loi sur le casier judiciaire.** En effet, le pardon dont il est question dans cette loi ne peut s'appliquer aux repris de justice, puisqu'une demande de pardon ne peut être présentée sous son régime que si le nombre d'années fixées s'est écoulé "depuis l'expiration de la peine d'emprisonnement ou de la période de probation ou le paiement de l'amende, selon le cas". La peine de détention préventive dont le repris de justice fait l'objet ne prenant jamais fin, celui-ci ne peut jamais être admis à présenter une demande de pardon sur le fondement de la **Loi sur le casier judiciaire.**

Plusieurs des repris de justice qui ont demandé un pardon en faisant valoir leur bonne conduite pendant une longue période alors qu'ils étaient en liberté sous condition, se virent simplement répondre que leur demande était irrecevable puisqu'ils n'entraient pas dans le champ d'application de la **Loi sur le casier judiciaire.** Dans aucun de ces cas ne s'est-on demandé si le repris de justice ne pouvait pas solliciter le pardon sur le fondement des autres sources mentionnées ci-dessus.

3. La prérogative royale de clémence

Les rapports entre l'exercice de la prérogative royale sous toutes ces formes et l'évolution du Parlement au cours des siècles ont posé les fondements de la Constitution britannique, de laquelle découle notre forme de gouvernement [6]. Dans ses **Commentaries on the Laws of England** [7], Sir William Blackstone affirme que :

> "one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the King's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject."

Même si notre étude porte essentiellement sur la prérogative de clémence, il convient de noter que celle-ci ne constitue qu'une des nombreuses prérogatives qui appartiennent ou ont appartenu à la Couronne. Dans son ouvrage **A Treatise on the Law of the Prerogatives of the Crown** [8], Joseph Chitty analyse en profondeur les prérogatives historiques de la Couronne. Le souverain bénéficiait de prérogatives sur de nombreux sujets, dont les affaires étrangères, l'Église d'Angleterre, les Chambres du Parlement, l'octroi d'honneurs, de privilèges et de franchises, le commerce extérieur ainsi que les impôts. Les prérogatives royales touchant à l'administration de la justice présentent en l'occurrence un intérêt particulier. Le souverain était considéré comme la source de justice et le responsable de l'application de toutes les lois. Chitty souligne en effet que [9] :

> "As the **fountain of justice,** and administrator of the laws, all judicial power is supposed to be derived from the Crown; and though the King himself possesses none, yet he appoints those by whom it is exercised, and constitutes courts and offices. The pardoning offendors and issuing proclamations are also ranked among the prerogatives of the Crown."

Une autre prérogative du souverain était d'agir comme "protecteur" à l'égard des mineurs, des malades mentaux ainsi que des institutions de bienfaisance. La Couronne est considérée, au plan juridique, comme investie à l'égard des citoyens d'un pouvoir de sauvegarde l'obligeant à prendre soin des sujets qui, pour des raisons juridiques ou à cause de leur état mental, sont incapables de vivre ou de gérer leurs biens sans aide extérieure.

La nécessité pour la Couronne d'exercer ses prérogatives disparut dans bien des cas par l'adoption par le Parlement de lois sur le sujet considéré. Pour qu'un texte législatif touche à une prérogative royale ou l'abroge, il faut toutefois qu'il le prévoie expressément. Le Parlement a d'ailleurs clairement posé ce principe à l'article 16 de la **Loi d'interprétation** :

> "Sauf dans la mesure déclarée, Sa Majesté n'est ni liée ni visée
>
> 16. Nul texte législatif de quelque façon que ce soit ne lie Sa Majesté ni n'a d'effet à l'égard de Sa Majesté ou sur les droits et prérogatives de Sa Majesté, sauf dans la mesure y mentionnée ou prévue."

Les limites de la prérogative royale ont été dégagées progressivement au cours des siècles. Sir Henry Finch, sous le règne de Charles Ier, a bien résumé la nature de la prérogative de la Couronne 10 :

> "The King hath a prerogative in all things, that are not injurious to the subject; for in them all that must be remembered, that the King's prerogative stretcheth not to the doing of any wrong."

Pour reprendre l'expression qu'a utilisée le juge Denning au sujet de la doctrine de l' **equitable estoppel** dans l'affaire

Central London Property Trust Ltd. v. Hightrees House Ltd. [11], la prérogative royale doit être un bouclier qui protège le sujet, plutôt qu'un glaive qu'on utilise contre lui. Ce principe a été appliqué par la Chambre des Lords dans l'affaire **Attorney General v. De Keyser's Royal Hotel** [12], où les pouvoirs assimilables à des pouvoirs d'expropriation que l'on voulait exercer auraient causé au citoyen un préjudice allant bien au-delà de ce que permettaient les dispositions législatives applicables.

Le but poursuivi par la présente enquête reflète ce que disait le grand juriste britannique du moyen-âge Henry Bracton, qui affirmait ce qui suit au sujet de l'exercice de la prérogative royale de clémence [13] :

> "A King ought not only to be wise but merciful, his justice tempered with wisdom and mercy. Yet though there is greater safety in having to render a final account for mercy rather than judgment, it is safest that a judge's eyes precede his steps, that judgment not become uncertain through unconsidered discretion nor mercy debased by indiscriminate application, for mercy is indeed unjust when it is extended to the incorrigible."

Il est en conséquence tout à fait conforme à nos traditions juridiques qu'un juge se penche sur le cas de ceux qui ont autrefois été considérés comme irrécupérables et déclarés repris de justice, pour voir s'ils ne devraient pas bénéficier de la clémence de la Couronne dans la mesure où la situation est changée et où ils ne représentent plus de danger pour la société.

Il y a un peu moins de deux siècles, un autre éminent juriste anglais, Sir William Blackstone, écrivait ce qui suit au sujet de la prérogative royale de clémence [14] :

> "...the King's most gracious pardon; the granting of which is the most amiable prerogative of the Crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the King in his coronation oath, and it is that act of his government which is the most personal and most entirely his own.
>
> The King himself condemns no man; that rugged task he leaves to his courts of justice; the great operation of his scepter is mercy. His power of pardoning was said by our Saxon ancestors to be derived a lege suae dignitatis (from the law of his dignity): and it is declared in Parliament (1536) that no other person hath power to pardon or remit any treason of felonies whatsoever, but that the King hath the whole and sole power thereof, united in knit to the imperial crown of this realm.
>
> . . . .
>
> Pardons (according to some theorists) should be excluded in a perfect legislation, where punishments are mild but certain; for that the clemency of the Prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the Judge or jury, that of construing the criminal law by the spirit instead of the letter; or else it must holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment".

Blackstone a défini également la portée de la prérogative royale de clémence. Si le souverain a le pouvoir de pardonner toutes les infractions contre la Couronne ou contre les citoyens, il ne peut cependant :

a) s'autoriser de la prérogative royale de clémence pour accorder un pardon relativement à des faits essentiellement privés, "le souverain ne devant pas porter préjudice à une personne pour en favoriser une autre";

b) ni accorder un pardon à l'égard d'un trouble public qui persiste.[15]

Dans son traité sur les prérogatives de la Couronne, Joseph Chitty énonce ainsi les principes qui gouvernent la matière [16] :

> "The King's right to pardon and remit the consequences of a violation of the law, is confined to cases in which the prosecution is carried on in His Majesty's name, for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture, to which His Majesty is entitled.
>
> . . . .
>
> So, where any legal right or benefit is vested in a subject, the King cannot affect it; and, consequently, where a statute gives a right of action to a party grieved, by the commission of an offence, though it be of a public description, His Majesty has no power, by law to prevent the party aggrieved from bringing his action, even by pardoning the offender before it is commenced, nor can His Majesty discharge a recognizance to keep the peace towards an individual before it is forfeited, private security being the object of the instrument.
>
> . . . .
>
> In short the general principe is clear, that the King cannot pardon in cases where no interest is, either in point of fact, or by implication of law, vested in him.
>
> . . . .

> The King's prerogative right to pardon violations of the law is not confined to offences punishable at common law by indictment. His Majesty may by a charter of pardon discharge not only a suit in the spiritual court **ex officio**; but also any suit in such court **ad instantiam partis pro reformatione morum** or **salute animae**; as for defamation, or laying violent hands on a clerk, but the King cannot, by pardoning, discharge any suit in a spiritual (or other) court in which the Plaintiff seeks to recover any property; or in which any interest is vested in him : as in the case of a suit for tithes or legacies.
>
> . . . .
>
> There is another case in which offenders are entitled as a matter of legal right to a pardon; and that is where the King promises to pardon them, by special proclamation in the gazette or otherwise."

L'opinion de Sir Matthew Hale, baron en chef de l'Echiquier de 1660 à 1671 et juge en chef de la Cour du banc du Roi de 1671 à 1676, va d'ailleurs dans le même sens. Celui-ci écrit en effet dans **The Prerogatives of the King** 17 :

> "Exemption from guilt and punishment comes properly enough under this title, **viz** by pardon. The King, as appears before, is by the laws entrusted with the prosecution and punishment of public offences, so far forth as they are public, as for misdemeanors, nuisances, felonies, upon indictment, suits in star chamber, in the ecclesiastical courts **ob salutem animae** ... These are pardonable by the King, for though he cannot dispense with the offences before committed, because he is not, nor can be, entrusted with such power, which would tend so far to the prejudice of the kingdom...the King cannot release a surety fo the peace before it be broken, but after he may. So he may pardon

> those offences of the highest nature as against his own suit, though not against the suit of the party,... The King's pardon in such cases is so strong that it takes away the guilt **in foro humano** as well as the punishment."

La prérogative royale de clémence s'applique donc, selon la **common law**, à toutes les sanctions infligées par suite de procédures à caractère public engagées par Sa Majesté. La prérogative royale permettait à la Couronne de lever les condamnations prononcées par les tribunaux ecclésiastiques, la Chambre étoilée ou différentes autres instances; elle n'a jamais été limitée aux seules infractions pénales. Le seul principe limitant l'exercice de la prérogative de clémence est celui interdisant que cette dernière ne serve à favoriser une personne en causant un préjudice à une autre [18]. Ou, comme le dit Chitty, le souverain "peut accorder son pardon aux délinquants, mais ne saurait porter atteinte aux droits et recours civils" [19].

Lorsqu'elle accepte d'exercer la prérogative de clémence, la Couronne a la possibilité de restreindre l'effet du pardon à certaines infractions seulement et assujettir celui-ci à des conditions. Blackstone écrit à cet égard :

> "A pardon may also be conditional; that is the King may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country (usually to some of His Majesty's colonies and plantations in America) for life, or for a term of years; such transportation or banishment being allowable and warranted by the Habeas Corpus Act."

Sur le même sujet, Chitty affirme ce qui suit 20:

> "By the common law, the King may annex to his bounty a condition either precedent or subsequent; on the due performance whereof the validity of the pardon will depend.
>
> . . . .
>
> The prerogative may also be partially exercised in pardoning an offender; so that the King may remit part of the sentence of the law."

Les juristes du passé ont, semble-t-il, vivement discuté de la question de savoir si le souverain pouvait se prévaloir de sa prérogative de clémence pour accorder au condamné à mort une forme d'exécution moins pénible. Plus précisément, l'on se demandait si le roi avait la faculté, en se fondant sur sa prérogative de clémence, de commuer une condamnation à la pendaison ou au feu en condamnation à la décapitation, celle-ci étant alors tenue pour plus humaine. Après avoir exposé les deux thèses en présence, Chitty exprime l'opinion suivante :

> "The better opinion seems to be, that the King is entitled to the prerogative in question; and that as he may pardon a criminal on certain conditions, there is no objection to the condition being the offender's submission to a less severe punishment. The punishment which the law has inflicted is certainly altered by this prerogative, but the power of pardoning or punishing is left by the British constitution very generally with the King."

Ainsi que nous l'avons déjà mentionné, les **Lettres patentes constituant la charge de gouverneur général du Canada** autorisent celui-ci "à exercer tous les pouvoirs et attributions dont Nous sommes validement investi à l'égard du Canada". Cela est en accord avec la tradition en vertu de laquelle les pouvoirs de prérogative sont normalement délégués au gouverneur de la colonie ou, dans le cas d'une ancienne colonie, au gouverneur général. Par cette délégation, le souverain ne renonce toutefois pas complètement à ses prérogatives 21. Le juge en chef de la Cour suprême du Canada, Sir Henry Strong, a en effet posé ce principe dans l'arrêt **Attorney General for Canada v. Attorney General for Ontario,** (1894) 23 R.C.S. 458, à la page 468. Il s'est exprimé à ces termes 22 :

> "By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the Crown, not merely as regards the territorial limits ot the United Kingdom, but throughout the whole of Her Majesty's dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the Crown. Such delegation, whatever may be the conventional usage established on grounds or political expediency, a matter which has nothing to do with the legal question, cannot however in any way exclude the power and authority of the Crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's dominions. I take it to be the invariable practice, in the case of colonial governors to delegate to them the authority to pardon in express terms, either by the commission under the Great Seal, or in the instructions communicated to them by the Crown. This being so, and this practice having prevailed as far as I can discover universally and for a long series of years, I should have thought that it at least implied that in the opinion of the law officers of the Crown, an authority

> on such points second only to that of a judicial decision, that the prerogative of pardoning offences was not incidental to the office of a colonial governor, and could only be executed by such an officer in the absence of legislative authority, under powers expressly conferred by the Crown.... That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be well recognized constitutional canon."

Il ne fait donc aucun doute que Sa Majesté conserve la possibilité d'utiliser sa prérogative de clémence, et que l'exercice de celle-ci n'est, au Canada, nullement restreinte par les **Lettres patentes constituant la charge de gouverneur général du Canada**.

J'en suis donc venu à la conclusion qu'il est possible, en dehors du pouvoir particulier de pardon prévu par la **Loi sur le casier judiciaire**, d'utiliser le pouvoir de pardon dans le cas des repris de justice objets de la présente enquête. Je crois qu'il est possible d'utiliser à leur égard le pouvoir de pardon créé par l'article 683 du **Code criminel**, ou même le pouvoir de pardon institué par les **Lettres patentes créant la charge de gouverneur général du Canada** ou la prérogative royale de clémence.

Il a toutefois déjà été soutenu que tous ces recours, ou certains d'entre eux, ne peuvent être employés en un tel cas. J'entends maintenant réfuter une à une ces affirmations.

Commençons par l'article 683 du **Code criminel**. Les deux paragraphes de cet article qui nous intéressent prévoient ce qui suit :

> "683.(1) Sa Majesté peut accorder la clémence royale à une personne condamnée à l'emprisonnement sous l'autorité d'une loi du Parlement du Canada, même si cette personne est emprisonnée pour omission de payer des deniers à une autre personne.
>
> (2) Le gouverneur en conseil peut accorder un pardon absolu ou un pardon conditionnel à toute personne déclarée coupable d'une infraction."

Le texte non ambigu du paragraphe 683(1) ne semblerait pas permettre de douter que Sa Majesté peut se servir de sa prérogative de clémence à l'égard d'un repris de justice. Le repris de justice est en effet, sans l'ombre d'un doute, "une personne condamnée à l'emprisonnement sous l'autorité d'une loi du Parlement du Canada". Il s'en est néanmoins trouvé pour soutenir que les dispositions du paragraphe 1 ne s'appliquent qu'aux cas où la personne "est emprisonnée pour omission de payer des deniers à une autre personne". L'origine de ce paragraphe en question, fait-on valoir, tendrait en effet à prouver que le champ d'application de celui-ci est aussi restreint. Ce paragraphe reprendrait les dispositions d'une loi britannique de 1859 - 22 Victoria chap. 32. Ce texte est ainsi rédigé :

> "Whereas penalties which under penal statutes are made payable to parties other than the Crown cannot be remitted or pardoned by the Crown where no express provision has been made by the statute for that purpose, and it is expedient that the law as to the remission of such penalty should be amended and made uniform: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lord Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, as follows; that is to say,

> It shall be lawful for Her Majesty (or in Ireland for the Lord Lieutenant or other Chief Governor or Governors of Ireland) to remit in whole or in part any sum of money which under any Act now in force or hereafter to be passed may be imposed as a penalty or forfeiture on a convicted offender, although such money may be in whole or in part payable to some party other than the Crown, and to extend the royal mercy to any person who may be emprisoned for non-payment of any sum of money so imposed, although the same may be in whole or in part payable to some party other than the Crown."

L'essentiel des dispositions du texte britannique a été repris par le législateur canadien à l'article 125 de l' **Acte concernant la Procédure dans les causes criminelles ainsi que certaines autres matières relatives à la loi criminelle,** qui constitue le chapitre 29 des Statuts du Canada de 1869. Cet article est ainsi rédigé :

> "125. La couronne pourra étendre la clémence royale à toute personne condamnée à l'emprisonnement en vertu d'un statut, bien qu'elle soit emprisonnée pour non-paiement de deniers à quelque partie autre que la couronne."

Je reconnais que l'ancêtre de l'article 683 du **Code criminel** modifiait les pouvoirs dont disposait la Couronne suivant la **common law** en ce que le texte considéré permettait à la prérogative de jouer même dans les cas où les intérêts en cause présentaient un caractère privé, chose que n'autorisait pas la **common law.** Je n'admets toutefois pas qu'il en résulte que le paragraphe 683(1) ne peut recevoir d'application que dans les cas de cette nature.

L'article 11 de la **Loi d'interprétation** dispose que :

> "11. Chaque texte législatif est censé réparateur et doit s'interpréter de la façon juste, large et libérale la plus propre à assurer la réalisation de ses objets."

L'argument que le paragraphe 683(1) ne vise que les situations où la personne est emprisonnée pour non-paiement à une autre d'une somme d'argent reconnaît le caractère réparateur d'une partie de l'article considéré, mais se trouve à violer les prescriptions de l'article 11 de la **Loi d'interprétation** en ce qu'il n'interprète pas l'ensemble de ce même article de la façon juste, large et libérale la plus propre à assurer la réalisation de ses objets. Les dispositions en cause étaient réparatrices du fait qu'elles étaient destinées à supprimer l'une des restrictions, au demeurant peu nombreuses, que la **common law** mettait à l'exercice de la prérogative de clémence. Le texte de cet article est suffisamment clair à cet égard. J'estime que les antécédents de l'article en question ne justifient aucunement l'interprétation qu'on prétend en donner et que, en toute hypothèse, l'on ne saurait invoquer l'historique d'une disposition législative pour en trouver les termes clairs et précis.

Je fais miennes les paroles du juge en chef Hazen dans l'arrêt **R. v. Bank of Montreal,** (1919) 49 D.L.R. 288 :

> "...I think there can be no doubt whatever as to what the intention of the legislature was, and that being so, I do not think we should search for canons of construction in order to define what the meaning of the statute is, as its meaning is absolutely clear without any canons of construction being applied."

Une telle opinion a d'ailleurs été exprimée plus d'une fois par les tribunaux. Citons ce que disait le juge Riddell 23 :

> "Whatever those seeking the act intended or supposed, we cannot go behind the language of the statute - nor, where the language is plain and unambiguous, can we look to the supposed purpose of the legislation."

Rappelons aussi ce qu'affirmait le juge Nesbitt de la Cour suprême du Canada dans l'arrêt **C.P.R. v. James Bay Railway** 24 :

> "The general rule which is applicable to the construction of all other documents is equally applicable to statutes and the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words related to. He may call to his aid all those external or historical facts which are necessary for this purpose and which led to the enactment and for those he may consult contemporary or other authentic works and writings. This, however, does not justify a departure from the plain reasonable meaning of the language of the Act."

En l'occurrence, c'est la thèse qui aurait pour effet de limiter le champ d'application du paragraphe 683(1) qui va à l'encontre du principe de **common law** voulant que "le pardon reçoive l'application la plus favorable au sujet et la plus défavorable au Roi" ("a pardon shall be taken most beneficially for the subject, and most strongly against the King") 25. Or, l'interprétation mise de l'avant par ceux qui professent l'opinion dont il s'agit est en complète opposition avec l'esprit de notre droit et les dispositions non équivoques de la loi considérée. Il est en conséquence manifestement contre-indiqué de s'éloigner du sens clair de ce texte.

J'estime donc que les dispositions du paragraphe 683(1) du **Code criminel** constatent le pouvoir de Sa Majesté d'exercer sa grâce à l'égard des détenus classés repris de justice. Elles ne créent pas ce pouvoir puisque le souverain, à mon sens, en est déjà investi par la **common law** du fait de la prérogative royale de clémence. Les dispositions du paragraphe 683(1) n'ont nullement pour effet, je l'affirme sans hésitation, d'abroger le pouvoir de Sa Majesté de gracier les repris de justice.

Venons-en maintenant au paragraphe 683(2) du **Code criminel**, qui dispose que :

> "683.(2) Le gouverneur en conseil peut accorder un pardon absolu ou un pardon conditionnel à toute personne déclarée coupable d'une infraction."

Alors que le paragraphe 683(1) renvoie aux pouvoirs de Sa Majesté, le paragraphe 683(2) autorise pour sa part le gouverneur en conseil à accorder un pardon. Il a été soutenu que les dispositions du paragraphe 683(2) ne s'appliquent pas aux repris de justice, puisque, selon le raisonnement suivi dans les arrêts **Brusch v. The Queen**, [1953] 1 R.C.S., et **Kirkland v. The Queen**, [1957] S.C.R. 3, le fait pour une personne d'être officiellement qualifiée de repris de justice ne constitue qu'un classement de celle-ci ne pouvant être assimilé à une déclaration de culpabilité d'une infraction.

Il s'agissait, dans la première de ces affaires, de déterminer si le dénommé Brusch aurait pu avoir la possibilité de choisir la façon dont il serait jugé relativement aux procédures engagées contre lui en vue de le faire déclarer repris de justice. L'intéressé soutenait avoir le droit d'effectuer un tel choix, les procédures visant à le faire déclarer repris de justice devant, selon lui, être considérées comme une mise en accusation pour acte criminel. Il prétendait en outre que, du fait qu'il n'avait jamais choisi d'être jugé par le juge de la Cour de comté qui avait statué sur son cas, le juge en question n'avait pas compétence pour le déclarer repris de justice. Ces arguments furent rejetés en ces termes par le juge Estey.

> With great respect to those who entertain a contrary opinion, Part XVIII restricts the right to an election to certain indictable offences. The addition of a charge of being an habitual criminal, after the required notice, does not become a part of the offence or crime charged in the indictment. There is, therefore, no right, within the meaning of the provisions of Part XVIII, to a further election upon the crime as charged, when a charge of being an habitual criminal is added to the indictment.

L'affaire **Brusch** fut suivie de plusieurs autres où il fut posé que, pour les fins du **Code criminel**, c'est-à-dire pour ce qui est de choisir le mode de procès ou de former appel de ce qui constituerait normalement une "déclaration de culpabilité", le fait de soutenir qu'une personne est un repris de justice n'équivaut pas à lui reprocher une "infraction", et celui de la déclarer repris de justice ne constitue pas une "déclaration de culpabilité".

Le point de savoir si le paragraphe 683(2) peut être utilisé pour gracier les repris de justice est plutôt théorique, puisque j'en suis déjà arrivé à la conclusion que le paragraphe 683(1) du **Code criminel** permet une telle mesure. Néanmoins, il semble, si l'on se fie à l'arrêt **Brusch** et aux décisions qui l'ont suivi, que la personne déclarée repris de justice ne saurait pour cette seule raison être considérée comme une "personne déclarée coupable d'une infraction".

Mais il va sans dire que, par définition, l'on ne peut être classé repris de justice sans avoir été condamné pour des infractions. Le paragraphe 683(2) ouvre la possibilité d'octroyer un pardon à l'égard des infractions dont il faut s'être rendu coupable pour être déclaré repris de justice. Si ces infractions font l'objet d'un pardon, la qualification de repris de justice et la détention préventive à laquelle elle donne lieu cesseraient forcément, peut-on croire, d'avoir effet. Je ne crois cependant pas qu'il faille prendre des voies aussi détournées pour gracier les repris de justice en se fondant sur le pouvoir de pardon.

Une autre thèse veut que, vu la décision qui a été rendue dans l'affaire **Brusch**, le paragraphe XII des **Lettres patentes constituant la charge de gouverneur général du Canada** n'autorise pas à accorder un pardon aux repris de justice, puisque le pouvoir de pardon est en l'occurrence limité aux cas où "un crime ou une infraction aux lois du Canada a été commis pour lequel le délinquant peut subir un procès en vertu desdites lois" et au "délinquant déclaré coupable de tel crime ou infraction devant n'importe quel tribunal". Je ne crois toutefois pas que les décisions judiciaires qui ont défini les notions d'"infraction" ou de "déclaration de culpabilité" aux fins des dispositions procédurales du **Code criminel** s'imposent au gouverneur général lorsqu'il interprète la délégation de pouvoirs que lui a consentie Sa Majesté par le paragraphe XII de ces lettres patentes.

Les tribunaux, et notamment la Cour suprême du Canada, doivent interpréter les dispositions procédurales à caractère technique du **Code criminel** afin de déterminer de quelles guaranties de procédure disposent la personne que l'on cherche à faire ranger au nombre des repris de justice. Il n'en résulte pas pour autant que ces dispositions lient le gouverneur général dans l'exercice des pouvoirs que lui confère le paragraphe XII. Les notions de repris de justice et de procédure pour faire déclarer une personne repris de justice, telles qu'elles apparaissent au **Code criminel**, étaient inconnues lorsqu'ont été rédigées les dispositions en cause des lettres patentes. L'esprit du paragraphe XII des lettres patentes me semble clair. Celui-ci, à mon sens, autorise le gouverneur général à accorder aux repris de justice un pardon, soit libre, soit sujet à des conditions licites, ou un sursis à l'exécution de leur sentence.

Que les conclusions auxquelles j'en arrive relativement au paragraphe XII des lettres patentes soient exactes ou non, j'estime que celui-ci autorise le gouverneur général à exercer la prérogative royale de clémence à l'égard des questions relatives au Canada. La prérogative royale de clémence, je l'ai déjà dit, ne s'appliquait pas seulement aux infractions ou condamnations pénales. Le souverain avait en effet également la possibilité de s'en servir pour réduire ou annuler les sanctions prononcées dans les instances publiques intervenues devant les tribunaux ecclésiastiques, la chambre étoilée ou d'autres juridictions. Je suis d'avis que l'application de la prérogative royale de clémence ne peut être exclue que par des dispositions législatives ou des principes juridiques exprès. Or, il n'existe aucune disposition législative ou principe juridique de cette nature.

L'arrêt **Brusch** a souligné qu'à certains égards, la situation de la personne déclarée repris de justice ressemble assez à celle de la personne dont il a été constaté qu'elle souffre d'aliénation mentale ou qui a été déclarée non coupable pour cette même raison. Il ne fait aucun doute que le souverain a la faculté, en se fondant sur sa prérogative de "protecteur" des citoyens, de gracier la personne qui se trouve dans l'un ou l'autre des cas que nous venons de mentionner. Comme je l'ai déjà dit, la prérogative vise à donner la possibilité de prendre des mesures de clémence en faveur des sujets. Dès lors, l'opinion selon laquelle l'on ne saurait utiliser la prérogative pour remettre en liberté une personne qui pourra parfois être emprisonnée depuis de très nombreuses années, sous prétexte que la mesure d'où résulte sa détention présente un caractère civil, ne m'apparaît pas devoir être retenue.

Il m'est donc agréable de constater qu'un semblable argument a été rejeté par le Conseil privé lorsque celui-ci a eu à se prononcer sur un renvoi émanant des Îles Bahamas, [1893] A.C. 138, renvoi connu sous le nom de **Moseley.** Dans l'affaire en question, M. Moseley, éditeur du **Nassau Guardian** avait publié une lettre signée "un colon", qui critiquait le juge en chef des Îles Bahamas à la suite de deux lettres que celui-ci avait écrites au même journal sur des questions relatives à l'hygiène de la ville de Nassau. Le juge en chef exigea de Moseley qu'il révèle l'identité de l'auteur de la lettre considérée. Sur le refus que Moseley lui opposa, le juge en chef le condamna, pour outrage au tribunal et à sa fonction, à être emprisonné pour une période dont il se réservait de déterminer la durée et à verser au tribunal une amende de 40 livres avant de pouvoir retrouver sa liberté. Une délégation d'habitants de Nassau pria le gouverneur de libérer Moseley. Le gouverneur consulta le secrétaire d'État, qui lui affirma qu'il avait le pouvoir de relâcher Moseley. C'est ce qu'il fit.

Les lettres patentes constituant la charge de gouverneur des Bahamas accordaient à celui-ci le pouvoir d'accorder "à tout délinquant déclaré coupable d'un crime devant n'importe quel tribunal, juge, juge de paix ou magistrat des présentes îles un pardon, soit libre, soit assorti de conditions licites, ou un sursis à l'exécution de la sentence de ce délinquant, pendant la période que Notre gouverneur général pourra juger pertinente, et à faire remise de toute amende, peine ou confiscation qui peut Nous devenir due et payable" 26. Le juge en chef ayant protesté contre l'élargissement de Moseley, le secrétaire d'Etat pria le Comité judiciaire du Conseil privé de lui faire connaître son avis sur la question. Il demandait entre autres choses à ce dernier de déterminer si, en droit et en fait, le gouverneur pouvait libérer Moseley.

Le juge en chef fit valoir ce qui suit au Conseil privé :

> "With regard to the Governor's power to release, it depends upon whether Mr. Moseley was a person convicted of crime within the meaning of the Governor's Letters Patent. He was not convicted of crime, and therefore neither the Crown nor Governor had power to pardon him. Contempt of Court was a civil proceeding."

Refusant de le suivre, le Conseil privé décida :

> "3. That the royal prerogative extends to the remissions of sentences which are merely of a punitive character, inflicted for contempt of Court, that the commission of the Governor of the Bahamas Islands vested in him the power to exercise the royal prerogative in this respect, and that he had therefore power, in the circumstances, to order the release of Mr. Moseley."

La situation du gouverneur général du Canada est, selon moi, à peu près la même. Il peut exercer les pouvoirs énoncés au paragraphe XII des lettres patentes et, en vertu de la délégation prévue au paragraphe II des lettres patentes, pouvant appartenir à Sa Majesté en vertu de la prérogative royale.

La prérogative royale de clémence a été employée dix-huit fois en tout en Angleterre pour accorder une remise relativement à des peines de détention préventive. Le tableau 3 donne plus de détails sur l'usage que l'on a fait de la prérogative royale de clémence au Royaume-Uni.

Au Canada, le pouvoir de pardon a été utilisé en faveur de personnes condamnées pour la plus grave des infractions prévues au **Code criminel**, le meurtre. Le 17 juillet 1981, un pardon conditionnel a en effet été accordé à James Ross Davis. Davis avait été reconnu coupable, le 5 novembre 1976, d'un meurtre du second degré intervenu le 1er avril de cette même année. À l'époque de sa condamnation, il était âgé de seize ans, étant né le 20 janvier 1960. L'on justifia ainsi la mesure de clémence en cause :

> "Il a jugé inéquitable d'obliger Davis, vu les circonstances entourant l'infraction pour laquelle il a été condamné et son âge au moment de celle-ci, à passer plus longtemps les années cruciales de son existence dans un pénitencier de criminels endurcis."

Le pardon ainsi octroyé comportait diverses obligations semblables à celles imposées aux libérés sous conditions. Parmi celles-ci, mentionnons les suivantes :

a) rester sous l'autorité d'un surveillant;

TABLEAU 3

EXERCICE DE LA PRÉROGATIVE ROYALE DE CLÉMENCE POUR ACCORDER UNE REMISE RELATIVEMENT À UNE PEINE DE DÉTENTION PRÉVENTIVE 1908-1949

Année	Total	Motifs			
		Réduction pure et simple	Raison médicale	Pour irrégularité dans la condamnation	Pour récompenser le détenu pour les renseignements ou l'aide fournis
1908-9	0				
1910	3	3			
1911	0				
1912	1	1			
1913	0				
1914	0				
1915	1		1		
1916-23	0				
1924	7			7(1)	
1925	1(2)	1			
1926	1				1
1927-30	0				
1931	1(3)		1		
1932-7	0				
1938	1	1			
1939-48(4)	-				
1949	0				
TOTAL	16	6	2	7	1

(1) Affaires découlant de la décision rendue par la Cour d'appel dans l'affaire Norman (Cr APP R 1924-25 vol. xviii p. 81).

(2) La remise portait en l'occurrence sur une peine de détention préventive dite "remanet". Sous ce régime, le détenu libéré s'exposait, s'il faisait l'objet d'une nouvelle condamnation, à une période de détention préventive égale à la partie non exécutée de la peine initiale.

(3) Dans le présent cas, la remise porta à la fois sur deux condamnations à la détention préventive et sur des condamnations aux travaux forcés.

(4) Les statistiques criminelles pour la période 1939-1948 ne donnaient aucun chiffre sur l'exercice de la prérogative royale de clémence.

b) passer au moins un mois dans un centre d'hébergement communautaire;

c) se présenter devant le surveillant ou les autorités policières conformément aux exigences que lui communiquerait le surveillant;

d) ne pas quitter son lieu de résidence sans l'autorisation du surveillant.

J'estime que le pouvoir de pardon constitue le meilleur moyen pour prendre des mesures de clémence en faveur des repris de justice dont le cas le justifie. Le pardon donne en outre la latitude nécessaire pour tenir compte du degré de réadaptation sociale atteint par chacun des repris de justice.

NOTES - CHAPITRE 4

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1 **Hatchwell v. The Queen** (1974) 21 CCC (2d) 201, 3 N.R. 571 (S.C.C.).

2 **Percy Mitchell v. Her Majesty The Queen** (1984) 6 C.C.C. (3d) 193.

3 **Criminal Records Act**, R.S.B. 1970, chap. 12 (1st Supp.).

4 **Lettres patentes constituant la charge de gouverneur général du Canada**, S.R.C. 1970, Appendices, p. 446 et 449.

5 **Loi d'interprétation**, S.R.C. 1970, chap. I-12 modifié.

6 Par le préambule de l' **Acte de l'Amérique du Nord britannique de 1867**, 30 et 31 Victoria, c.3, qui énonce que le Canada est une Puissance "avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni".

7 **The Sovereignty of the Law**, selections from Blackstone's Commentaries on the Laws of England, ed. Jones, Garreth, p. 90.

8 Chitty, Joseph; **A Treatise on the Laws of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject** "(London: 1820)".

9 Chitty, à la p. 6.

10 **The Sovereignty of the Law** at p. 91 quoting Sir Henry Finch - Law : or Discourse Thereof (London, 1661), p. 84-85.

11 **Central London Property Trust Ltd v. Hightrees House Ltd.** [1947] K.B. 130.

12 See **Attorney General v. De Keyser's Royal Hotel** [1920] A.C. 208.

13 Brackton on **The Laws of Customs of England**, p. 306.

14 Ehrlich, J.W.; **Erlich's Blackstone** (Westport, Connecticut) p. 963.

15 **Ehrlich's Blackstone,** p. 964.

16 Chitty, Joseph; **A Treatise on the Laws of the Prerogatives of the Crown;** p. 90-94.

17 Sir Matthew Hales; **The Prerogatives of the King;** ed. Yale, D.E.C., (London : 1976) p. 260.

18 Voir **Thoms v. Sorrel** (1673) Vaugh 330 à la p. 343.

19 Chitty, J.; **A Treatise on the Laws of the Prerogatives of the Crown;** p. 8.

20 Chitty, H.; **A Treatise on the Laws of the Prerogatives of the Crown;** p. 96.

21 Voir Halsbury's **Laws of England** (4d), paragraphe 949, p. 606.

22 **Procureur génégal du Canada c. Procureur général de l'Ontario** (1984) 23 S.C.R. 458 à la p. 468-469.

23 **Toronto v. Toronto Railway** 46 D.L.R. 435.

24 **C.P.R. v. James Bay Railwas** (1905) 36 S.C.R. 42.

25 **Ehrlich's Blackstone,** p. 966.

26 **Re Moseley,** p. 144.

APPENDIX "A"

RE MITCHELL AND THE QUEEN

DECISIONS AND ORDER

A1

RE MITCHELL AND THE QUEEN

Ontario High Court of Justice, Linden J. July 7, 1983.

Extraordinary remedies — Habeas corpus — Availability — Prison inmate seeking to challenge validity of detention as habitual criminal on basis that continued detention violates Charter of Rights — Provincial superior court has jurisdiction to consider application for habeas corpus with certiorari in aid.

R. v. Miller (1982), 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 141 D.L.R. (3d) 330, 29 C.R. (3d) 153, 29 C.P.C. 159, leave to appeal to S.C.C. granted 46 N.R. 266n, folld

Other cases referred to

Mitchell v. The Queen, [1976] 2 S.C.R. 570, 24 C.C.C. (2d) 241, 61 D.L.R. (3d) 77, [1976] 1 W.W.R. 577, 6 N.R. 389; *Re Cardinal and Oswald and The Queen* (1982), 67 C.C.C. (2d) 252, 137 D.L.R. (3d) 145, [1982] 3 W.W.R. 593, 35 B.C.L.R. 201, *sub nom. Cardinal and Oswald v. Director of Kent Institution*; *Re Cadeddu and The Queen* (1983), 40 O.R. (2d) 128, 4 C.C.C. (3d) 97, 146 D.L.R. (3d) 629; abated 41 O.R. (2d) 481, 4 C.C.C. (3d) 112, 146 D.L.R. (3d) 653

Constitutional law — Charter of Rights — Enforcement of rights — Inmate seeking to challenge validity of detention as habitual criminal on basis that continued detention violates Charter of Rights — Provincial superior court court of competent jurisdiction — Jurisdiction similar to superior court's jurisdiction on habeas corpus applications — Canadian Charter of Rights and Freedoms, s. 24(1).

Cases referred to

R. v. Brooks et al. (1982), 38 O.R. (2d) 545, 1 C.C.C. (3d) 506, 143 D.L.R. (3d) 482, 2 C.R.R. 246; *Re Krakowski and The Queen* (1983), 41 O.R. (2d) 321, 4 C.C.C. (3d) 188, 146 D.L.R. (3d) 760

Constitutional law — Charter of Rights — Arbitrary detention or imprisonment — Inmate found to be habitual criminal and sentenced to indeterminate detention in penitentiary — Inmate twice released on parole but parole revoked — Inmate having spent 12 years in custody as habitual criminal — Whether inmate's continued detention violates guarantee against arbitrary detention or imprisonment — Meaning of "arbitrary" — Canadian Charter of Rights and Freedoms, s. 9.

Constitutional law — Charter of Rights — Interpretation — Use of International Covenant on Civil and Political rights as aid to interpretation — Prison inmate seeking to rely on provision of International Covenant as aid to interpretation of Charter provisions respecting protection against arbitrary detention or imprisonment and cruel and unusual punishment — International Covenant giving wider protection than explicit guarantee in Charter — Whether court may resort to International Covenant as aid to interpretation in circumstances — International Covenant on Civil and Political Rights, art. 15(1) — Canadian Charter of Rights and Freedoms, ss. 9, 11(i), 12.

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Inmate found to be habitual criminal and sentenced to period of indeterminate detention — Habitual criminal legislation since repealed — Inmate's prior criminal record consisting mainly of petty property offences —

A2

Inmate held in custody for 12 years — Whether inmate's continued detention constitutes cruel and unusual treatment or punishment — Whether treatment cruel and unusual if disproportionate to offence and offender — Whether inmate entitled to release if he can demonstrate that no longer danger to public within meaning of present dangerous offender legislation — Canadian Charter of Rights and Freedoms, ss. 11(i), 12, 24 — Cr. Code, ss. 688, 709.

In 1970 the applicant, a penitentiary inmate, was found to be a habitual criminal and sentenced to detention in a penitentiary for an indeterminate period. The provisions under which the applicant was sentenced had since been repealed and replaced by dangerous offender legislation. The applicant had a criminal record which consisted primarily of petty property offences. He had been released on parole on two occasions but on each occasion his parole was revoked and he was returned to the penitentiary. The applicant had now spent 12 years in the penitentiary under the indeterminate sentence and now applied for *habeas corpus* with *certiorari* in aid or for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* on the basis that his continued detention violated the provisions of ss. 9 and 12 of the Charter. Those provisions contain guarantees against arbitrary detention or imprisonment and cruel and unusual treatment or punishment respectively. The applicant also sought to rely on art. 15(1) of the International Covenant on Civil and Political Rights as an aid to interpreting ss. 9 and 12. Article 15(1) provides in part that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby".

Held, the application should be allowed in part. Although art. 2 of the International Covenant obligates Canada to adopt measures to give effect to its provisions, no Canadian legislation has been passed which expressly implements the Covenant. Nevertheless, it may be that the provisions of the Covenant can serve as an aid to the interpretation of the provisions of the Charter. It is apparent that the framers of the Charter looked to the Covenant when drafting the provisions of the Charter and contemplated that the courts would resort to Canada's international human rights obligations to help to interpret the Charter. However, art. 15(1) of the Covenant was of no assistance in interpreting ss. 9 and 12 of the Charter in view of the clear conflict between art. 15(1) and a specific provision of the Charter, namely, s. 11(*i*), which provides that "any person charged with an offence has the right . . . (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment". Section 11(*i*) gives the accused the advantage of the lesser penalty only if the change comes before he is sentenced and not at any time after his conviction as appears to be the case under art. 15(1). In Canada, the benefit of the lesser punishment extends beyond conviction until the time of sentencing, but no further.

It could not be said that the applicant's continued detention as a habitual criminal was a violation of the guarantee in s. 9 of the Charter against arbitrary detention or imprisonment. While the right to attack a procedure under s. 9 is not foreclosed merely by the fact that the procedure is set out in a statute and followed by a judge, since the court is required to scrutinize the procedure itself to determine whether it is arbitrary in the sense of being capricious, unreasonable, or unjustifiable, it could not be said that the procedure in this case was arbitrary in this sense. Although the habitual criminal legislation had been repealed, transitional provisions provided for the Parole Board to continue to review the inmate's detention and to grant parole in accordance with the guidelines set out in s.

10(1)(*a*) of the *Parole Act*, R.S.C. 1970, c. P-2. There was nothing inherently capricious or unreasonable about this procedure, and since the applicant had not adduced any evidence as to the criteria the Parole Board in fact employed to review his detention it could not be said that his continued detention contravened s. 9.

On the other hand, it was possible that the applicant's continued detention did violate the guarantee against cruel and unusual treatment or punishment in s. 12 of the Charter. Detention of a habitual criminal is "punishment" even though its primary purpose is the protection of the public, and is certainly "treatment" within the meaning s. 12. The standard to be applied in determining whether treatment or punishment is cruel and unusual is whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. The issue is whether the treatment or punishment is disproportionate to the offence and the offender. Thus, evidence that the treatment or punishment is unusually severe and excessive, in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment, will suffice to satisfy the test of disproportionality. Evidence of arbitrary imposition of the punishment, while relevant, is not a prerequisite to a finding of disproportionality. The treatment of the applicant in this case was certainly severe. Continuing to detain a person found to be a habitual criminal as a result of mainly petty property offences for an indeterminate period of time in excess of 12 years must be considered unduly severe in light of the maximum limits of punishment for serious *Criminal Code* offences. The continued detention of the applicant could have no general deterrent effect inasmuch as the habitual criminal legislation had been repealed. As well, if individual deterrence was the purpose of the detention then surely 12 years in custody had more than fulfilled that aim. If the applicant had not been deterred by 12 years of detention then it was doubtful that he could be deterred by any further incarceration. Continued detention of a person found to be a habitual criminal did not serve any valid penal purpose more effectively than a less severe treatment or punishment if the applicant was not a menace to society. If the applicant was not a danger to society then to detain him for more than 12 years surpassed all rational bounds of treatment or punishment and was so excessive as to outrage standards of decency. Accordingly, the applicant's right to protection against cruel and unusual treatment or punishment may have been infringed and the applicant may be entitled to relief pursuant to s. 24(1) of the Charter. However, there was no evidence presently before the court as to whether the applicant continued to be a danger to the public. In the circumstances, the appropriate disposition was for the court to exercise its jurisdiction under s. 709 of the *Criminal Code* and to order the further detention of the applicant with the applicant being entitled to apply to the court to fix a date for the continuation of the proceedings if, within 60 days, the Parole Board had not released him from custody and no appeal had been taken from the court's order. At the continuation of the application the onus would be on the applicant to establish that he was not a danger to society within the meaning of s. 688 of the present *Criminal Code* which defines a dangerous offender.

Collin et al. v. Kaplan et al. (1982), 1 C.C.C. (3d) 309, 143 D.L.R. (3d) 121, 2 C.R.R. 352; *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152, 1 C.R.R. 346; *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401, 63 D.L.R. (3d) 193, [1975] 6 W.W.R. 1, 33 C.R.N.S. 129; affd [1977] 2 S.C.R. 680, 31 C.C.C. (2d) 177, 70 D.L.R. (3d) 324, [1976] 5 W.W.R. 711, 38 C.R.N.S. 139, 11 N.R. 386; *McCann et al. v. The Queen et al.* (1975), 29 C.C.C.

(2d) 337, 68 D.L.R. (3d) 661, [1976] 1 F.C. 570; *R. v. Shand* (1976), 13 O.R. (2d) 65, 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395, 35 C.R.N.S. 202; leave to appeal to S.C.C. refused December 6, 1976, consd

Other cases referred to

Hatchwell v. The Queen, [1976] 1 S.C.R. 39, 21 C.C.C. (2d) 201, 54 D.L.R. (3d) 419, [1975] 4 W.W.R. 69, 3 N.R. 571; *Re Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495, [1932] 2 D.L.R. 250, 39 C.R.C. 161; *A.-G. Can. v. A.-G. Ont.*, [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299; *R. v. Secretary of State for Home Affairs et al., Ex p. Singh*, [1975] 2 All E.R. 1081; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Com'n et al.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, 18 N.R. 181; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408, 33 R.F.L. (2d) 279; *Re Van Duzen* (1982), United Nations Human Rights Committee Communication No. R. 12/50; *Coogans v. MacDonald*, [1954] S.L.T. 279; *R. v. Roestad*, [1972] 1 O.R. 814, 5 C.C.C. (2d) 564, 19 C.R.N.S. 190; leave to appeal to Ont. C.A. refused 19 C.R.N.S. 235*n*; *Levitz v. Ryan*, [1972] 3 O.R. 783, 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519; *R. v. Simon* (1982), 68 C.C.C. (2d) 86, 137 D.L.R. (3d) 231, [1982] 4 W.W.R. 71, 38 A.R. 377, 2 C.R.R. 74; *R. v. Newall et al. (No. 4)* (1982), 70 C.C.C. (2d) 10, 141 D.L.R. (3d) 26 *sub nom. R. v. Newall et al. (No. 3)*, 2 C.R.R. 156; *R. v. Frankforth* (1982), 70 C.C.C. (2d) 448; *R. v. McGregor* (1983), 3 C.C.C. (3d) 200, 145 D.L.R. (3d) 489; *R. v. Saxell* (1980), 33 O.R. (2d) 78, 59 C.C.C. (2d) 176, 123 D.L.R. (3d) 369; *Furman v. Georgia* (1972), 408 U.S. 238; *Gregg v. State of Georgia* (1976), 96 S. Ct. 2909; stay granted 96 S. Ct. 3235; rehearing denied 97 S. Ct. 197; *R. v. Simon (No. 3)* (1982), 69 C.C.C. (2d) 557, 141 D.L.R. (3d) 380, [1982] 5 W.W.R. 728, 38 A.R. 393, 2 C.R.R. 115; *Ex parte Matticks* (1973), 15 C.C.C. (2d) 213*n*, [1973] S.C.R. vi *sub nom. Pearson v. Lecorre*; *Re Baker and The Queen* (1981), 60 C.C.C. (2d) 476, 23 C.R. (3d) 52; *Re Ferreira and The Queen* (1981), 58 C.C.C. (2d) 147, [1981] 3 W.W.R. 737; *Kenny v. A.-G. Can. et al.*, [1977] 5 W.W.R. 393

Statutes referred to

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*a*), (*b*)
Canadian Charter of Rights and Freedoms, ss. 9, 11(*i*) 12, 24(1), 52
Criminal Code, 1953-54 (Can.), c. 51, ss. 659 (am. 1960-61, c. 43, s. 32; 1968-69, c. 38, s. 76 — now R.S.C. 1970, c. C-34, s. 687); 660 (am. 1960-61, c. 43, s. 33; 1968-69, c. 38, s. 77 — now s. 688); 666 (am. 1958, c. 38, s. 24(5); 1960-61, c. 43, s. 39; 1966-67, c. 25, s. 45 — later s. 694)
Criminal Code, R.S.C. 1970, c. C-34, ss. 204, 228 (am. 1981-82, c. 25, s. 17); 245.2 (enacted 1981-82, c. 25, s. 19); 241.1 (enacted *idem*); 246.2 (enacted *idem*); 294(*a*) (rep. & sub. 1972, c. 13, s. 23; 1974-75-76, c. 93, s. 25); 338(1)(*a*) (am. 1974-75-76, c. 93, s. 32); 617, 687 (rep. & sub. 1976-77, c. 53, s. 14); 688 (rep. & sub. *idem*); 695.1(2) (enacted *idem*); 709
Criminal Law Amendment Act, 1976-77 (Can.), c. 53, s. 15(2)
Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 18
International Covenant on Civil and Political Rights (1976), arts. 2, 15
Interpretation Act, R.S.C. 1970, c. I-23, s. 36(*e*)
Parole Act, R.S.C. 1970, c. P-2, s. 10(1)(*a*)
Supreme Court Act, R.S.C. 1970, c. S-19, s. 41 (am. 1974-75-76, c. 18, s. 5)

APPLICATION for writ of *habeas corpus* with *certiorari* in aid and relief pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

R. R. Price, Q.C., for applicant.
J. C. Pearson, for respondent, Attorney-General of Ontario.
B. R. Evernden, for respondent, Attorney-General of Canada.

LINDEN J.:—This is an application by Percy Wayne Mitchell for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, or for relief pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

In 1970, the applicant was found to be a habitual criminal and was sentenced to detention in a penitentiary for an indeterminate period. At the present time, he is incarcerated at the Joyceville federal penitentiary in Ontario, pursuant to that sentence of preventive detention. The imposition of the sentence of preventive detention is not being challenged in this application. Rather, the applicant has invited this court to find that his *continued* detention pursuant to that sentence violates his rights to be protected against cruel and unusual treatment or punishment, and not to be arbitrarily detained or imprisoned. The applicant relies upon changes to the provisions of Part XXI of the *Criminal Code*, R.S.C. 1970, c. C-34, and the enactment of the Charter of Rights in support of these allegations. In addition, he contends that ss. 9 and 12 of the Charter should be interpreted and applied in a manner consistent with Canada's obligations under art. 15 of the United Nations International Covenant on Civil and Political Rights.

I. *Jurisdiction*

Before a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, or relief pursuant to s. 24(1) of the Charter can be granted, the jurisdiction of this court to hear these applications must be established.

The decision of the Supreme Court of Canada in *Mitchell v. The Queen*, [1976] S.C.R. 570, 24 C.C.C. (2d) 241, 61 D.L.R. (3d) 77, calls into question this court's jurisdiction to entertain an application for a writ of *habeas corpus* with *certiorari* in aid. In *Mitchell*, Mr. Justice Ritchie held that a provincial superior court lacks jurisdiction to hear an application for *habeas corpus* with *certiorari* in aid when an act of the federal Parole Board is under review, since s. 18 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), provides that the Trial Division of the Federal Court has the exclusive jurisdiction to issue a writ of *certiorari* against any federal tribunal. Chief Justice Laskin came to the opposite conclusion in his dissenting judgment. The Chief Justice concluded that for the remedy of *habeas corpus* to be effective, it must embrace *certiorari* in aid.

The binding effect of Mr. Justice Ritchie's comments with respect to this issue have been called into question in several subsequent decisions. Both the British Columbia Court of Appeal and the Ontario Court of Appeal have declined to follow his conclusion. In *Re Cardinal and Oswald and The Queen* (1982), 67 C.C.C. (2d) 252, 137 D.L.R. (3d) 145, [1982] 3 W.W.R. 593 *sub nom. Cardinal and Oswald v. Director of Kent Institution*, Mr. Justice Anderson adopted the reasoning of the Chief Justice rather than that of Mr. Justice Ritchie. His Lordship noted that the issue of jurisdiction was essential only to the Chief Justice's opinion. Furthermore, Mr. Justice Ritchie's comments did not form the *ratio* of his decision, and two of the justices concurring with him did not expressly adopt his conclusion with respect to the availability of *certiorari* in the provincial superior courts. The other justices hearing the *Cardinal* appeal agreed with Mr. Justice Anderson's conclusion that the Supreme Court of British Columbia had jurisdiction to order *certiorari* in aid of *habeas corpus* against a federal board.

The Ontario Court of Appeal reached a similar result in *R. v. Miller* (1982), 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 141 D.L.R. (3d) 330. Mr. Justice Cory, for the court, concluded that the opinion of Mr. Justice Richie as to the exclusive jurisdiction of the Federal Court did not represent the opinion of the majority of the Supreme Court, and that it was open to him to adopt the reasoning of Chief Justice Laskin. The court concluded that in order to prevent the remedy of *habeas corpus* from being reduced to a "lifeless ineffectual shell", a provincial superior court must have jurisdiction to consider an application for *habeas corpus* either with *certiorari* in aid, or with affidavit material in support (at p. 50 O.R., p. 139 C.C.C., p. 341 D.L.R.). This decision is under appeal to the Supreme Court of Canada, leave having been granted on November 1, 1982 [45 N.R. 266*n*].

Although I recognize that the decision of our Court of Appeal in *Miller* may not be the final word on this issue, I am in agreement with the views of Mr. Justice Cory. As a result, I find that I have jurisdiction to entertain this application for the issuance of a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid. The fact that the basis for the application is an alleged infringement of the applicant's rights under the Charter does not change my conclusion. I rely upon the decision of Mr. Justice Potts in *R. v. Cadeddu* (unreported, judgment released December 31, 1982, Ont. H.C.J. [since reported 40 O.R. (2d) 128, 4 C.C.C. (3d) 97, 146 D.L.R. (3d) 629]), in that regard. In *Cadeddu*, Mr. Justice Potts entertained and granted an application for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, upon the ground that the applicant's right to liberty and not to be deprived thereof except in accordance with the principles of fundamental justice, as guaranteed by s. 7 of the Charter, had been violated. The Court of Appeal dismissed an appeal from that decision without dealing with the merits (unreported, judgment released April 28, 1983, Ont. C.A. [since reported 41 O.R. (2d) 481, 4 C.C.C. (3d) 112, 146 D.L.R. (3d) 653]).

The alternative type of relief sought in this application is a remedy pursuant to s. 24(1) of the Charter. Whether this court has jurisdiction to entertain an application under s. 24 appears to depend upon the subject-matter of the application, and perhaps the nature of the remedy sought. In *R. v. Brooks et al.* (1982), 38 O.R. (2d) 545, 1 C.C.C. (3d) 506, 143 D.L.R. (3d) 482, Mr. Justice Eberle held that "a court of competent jurisdiction" within the meaning of s. 24(1) means a court having jurisdiction "with respect to the matter that is sought to be enforced under s. 24" (at p. 547 O.R., p. 509 C.C.C., p. 484 D.L.R.). Accordingly, an applicant seeking relief "must look to the general law of the country to see what court is a court of competent jurisdiction to obtain the remedy appropriate in the circumstances" (at p. 547 O.R., p. 510 C.C.C., p. 485 D.L.R.). Similarly, in *Re Krakowski and The Queen* (unreported, judgment given April 7, 1983 [since reported 41 O.R. (2d) 321, 4 C.C.C. (3d) 188, 146 D.L.R. (3d) 760]), the Ontario Court of Appeal held that a court of competent jurisdiction is a court with jurisdiction to deal with the matter before it independently of the Charter. Applying these tests to the case at bar, I find that I have jurisdiction to entertain this application. The subject-matter of the application is a review of the detention of the applicant, and the s. 24 remedy sought is his release from custody. Since this court can exercise a similar jurisdiction on *habeas corpus* applications, I find that I am a court of competent jurisdiction to hear this matter.

Before passing on the merits of the application, it also should be noted that no issue as to the retroactive or retrospective application of the Charter arises on the facts of this case. This application is based upon alleged infringements of the Charter occurring at the present time as a result of the continuing incarceration of the applicant. None of the decisions of the various courts and of the Parole Board are being challenged. Nor is the legality of the detention of the applicant prior to the coming into force of the Charter under attack.

II. *Factual background*

The applicant was born on June 29, 1922. His first conviction was in 1939, for attempted theft. Since that time, he has been convicted of numerous property offences and sentenced to varying periods of incarceration. He has also been convicted of assaulting a police officer, attempting to escape from custody, and three counts of armed robbery. In an affidavit filed before this court, the applicant swears that his convictions for armed robbery did not involve the use of a weapon.

In June, 1969, the applicant was convicted of 14 property offences, each charge involving amounts under $50. He was sentenced to concurrent sentences of two years for each charge. In August of that year, the Quebec Minister of Justice brought an application to have the applicant declared a habitual criminal. The criteria for making such a finding was set out in s. 660 of the *Criminal Code*, 1953-54 (Can.), c. 51 (as amended 1960-61, c. 43, s. 33(1)):

> 660(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if
>
> (*a*) the accused is found to be an habitual criminal, and
>
> (*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.
>
> (2) For the purposes of subsection (1), an accused is an habitual criminal if
>
> (*a*) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or
>
> (*b*) he has been previously sentenced to preventive detention.

On August 17, 1970, His Honour Judge Laganiere of the Quebec Sessions Court found the applicant to be a habitual criminal, and sentenced him to preventive detention. By virtue of s. 659, preventive detention meant detention in a penitentiary for an indeterminate period. The *Code* required the Solicitor-General of Canada to review the "condition, history and circumstances" of a person sentenced to preventive detention at least once a year:

> 666. . . . for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.

In September, 1970, the applicant launched an appeal against the finding that he was a habitual criminal and the sentence of preventive detention. The Quebec Court of Appeal dismissed the appeal in March, 1973. The applicant then applied for leave to appeal to the Supreme Court of Canada. That application also was refused.

In January, 1976, the applicant was released on parole. Approximately six months later, he was taken back into custody due to a parole violation. No evidence was adduced as to the nature of the parole violation, although it appears from his criminal record that it may have involved a charge of using a stolen credit card.

The provisions of the *Code* pursuant to which the applicant was sentenced to preventive detention were repealed in 1977, and new provisions substituted. The new provisions of Part XXI of the *Code* enable a court to sentence a "dangerous offender" to an indeterminate period of incarceration in a penitentiary.

> 687. In this Part,
>
> "court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;
>
> "serious personal injury offence" means
>
> (*a*) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (*b*) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).
>
> 688. Where, upon an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court
>
> (*a*) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (*a*) of the definition of that expression in section 687 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,

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> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or
>
> (*b*) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (*b*) of the definition of that expression in section 687 and the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,
>
> the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted.

The emphasis thus has been shifted to protecting society from persons who are likely to continue to commit crimes which seriously endanger members of the public.

This change apparently was brought about in response to the decision of the Supreme Court of Canada in *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, 21 C.C.C. (2d) 201, 54 D.L.R. (3d) 419, and the Report of the Canadian Committee on Corrections (the Ouimet Report). In 1969, the Committee of Corrections concluded that the habitual offender legislation should be repealed and replaced by dangerous offender legislation [at pp. 257-8]:

> In recommending the repeal of the existing habitual offender legislation, the committee has been influenced by the following considerations:
>
> (a) The present legislation is broad enough to bring within its reach persistent petty offenders, many of whom are essentially inadequate, non-dangerous people.
>
> (b) The present legislation has in fact been applied, in a substantial percentage of cases where it has been invoked, to persistent offenders, who while constituting a serious social nuisance, are not dangerous. The Committee considers that such persistent offenders can be appropriately dealt with by substantial sentences, when warranted, under the appropriate provisions of the Code.
>
> (c) The present habitual offender legislation is so framed that many seriously dangerous offenders are beyond its reach because of the requirement of three previous convictions for an indictable offence for which the offender could have been sentenced to imprisonment for five years or more. The present legislation does not protect

> society against the offenders from whom society requires maximum protection.

It is apparent that most of the committee's recommendations were adopted by the framers of the new legislation.

On December 19, 1974, the Supreme Court of Canada released its judgment in *Hatchwell*. In that decision, the court restricted the application of the habitual criminal provisions of the *Code*. Mr. Justice Dickson, speaking for the court, observed [at pp. 43-4 S.C.R., p. 206 C.C.C., p. 425 D.L.R.]:

> Habitual criminal legislation and preventive detention are primarily designed for the persistent dangerous criminal and not for those with a prolonged record of minor offences against property. The dominant purpose is to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb. In those cases the way is clear and the word "menace" seems particularly apt and significant. That is not to say that crimes against property can never be cause for the invocation of preventive detention legislation, for the legislation contains no such exclusion and society is undoubtedly entitled to reasonable protection against crimes involving loss of or damage to property. It would seem to me, however, that when one is dealing with crime of this type, seeking to distinguish between that which is menace and that which is nuisance, there is greater opportunity and indeed necessity to assess carefully the true nature and gravity of the potential threat. For it is manifest that some crimes affecting property are very serious and others are not.

Although the new provisions of the *Code* substantially altered the criteria for sentencing offenders to an indefinite period, transitional provisions also were enacted to continue the detention of persons found to be habitual criminals and sentenced to preventive detention under the old legislation. Section 15(2) of the *Criminal Law Amendment Act*, 1976-77 (Can.), c. 53, provides:

> 15(2) Sections 688 to 695 of the *Criminal Code*, as enacted by section 14 apply to a person who, before the coming into force of that section, was sentenced to preventive detention under Part XXI of the *Criminal Code* as if the references in those sections to "a sentence of detention in a penitentiary for an indeterminate period" were references to "a sentence of preventive detention".

Section 695.1(2) of the new legislation also makes provision for such offenders:

> 695.1(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before the *Criminal Law Amendment Act, 1977* came into force, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the *Parole Act* and, if so, on what conditions.

Thus, the applicant continued to be held in custody after the new provisions of Part XXI of the *Code* came into effect. The applicant again appealed to the Quebec Court of Appeal in May, 1978, to review his status under the sentence of preventive detention. The court refused the applicant's request to reverse or alter its earlier judgment, primarily on procedural grounds. The court found that the applicant had not satisfied the requirements set out in the Quebec Rules of Practice for obtaining the type of relief sought. The Quebec Court of Appeal observed that three other means of obtaining relief were available to the applicant, namely, an appeal to the Supreme Court of Canada pursuant to s. 41 of the *Supreme Court Act*, R.S.C. 1970, c. S-19, an application for review by the Parole Board under s. 695.1(2) of the *Code*, and an application to the Minister of Justice pursuant to s. 617 of the *Code*. The applicant apparently has not pursued any of these alternatives.

In September, 1981, the applicant was paroled for the second time. He was taken back into custody in April, 1982, and his parole was suspended. On April 26, 1982, in Ottawa, Ontario, he was convicted of three property offences, and sentenced to a total of one year imprisonment. On June 10, 1982, his parole was revoked. The sentences imposed upon him in April, 1982 expired on April 25, 1983, and the applicant would have been eligible for release on mandatory supervision on December 26, 1982. The only reason for his continued incarceration at the present time is the sentence of preventive detention which was imposed upon him in 1970.

III. *The International Covenant on Civil and Political Rights*

On May 19, 1976, Canada acceded to the United Nations International Covenant on Civil and Political Rights. The Covenant came into force for Canada three months later, on August 19, 1976. Although art. 2 of the Covenant obligates Canada to adopt measures to give effect to the rights recognized therein, no Canadian legislation has been passed which expressly implements the Covenant. Such enabling legislation is required in order to make the Covenant part of the domestic law of Canada: see *Re Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495 at pp. 509-10, [1932] 2 D.L.R. 250 at pp. 259-60, 39 C.R.C. 161 (S.C.C.); *A.-G. Can. v. A.-G. Ont.*, [1937] 1 D.L.R. 673 at p. 678, [1937] A.C. 326 at p. 347, [1937] 1 W.W.R. 299 (J.C.P.C.); *Collin et al. v. Kaplan et al.* (1982), 1 C.C.C. (3d) 309 at pp. 310-1, 143 D.L.R. (3d) 121 at pp. 122-3, 2 C.R.R. 352 (F.C.T.D.); Department of the Secretary of State, *International Covenant on Civil and Political Rights:*

Report of Canada on Implementation of the Provisions of the Covenant (1979), p. 3. The force and effect of the Covenant in Canada thus is limited (at p. 6):

> Since the Covenant was not incorporated into domestic law and, therefore, does not have force of law at the federal, provincial and territorial levels, an individual cannot base a recourse on the Covenant itself if there has occurred within Canada a breach of a right or freedom therein recognized.

The Covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute, notwithstanding the fact that the Covenant has not been formally incorporated into the law of Canada, provided that the domestic statute does not contain express provisions contrary to or inconsistent with the Covenant. If such contrary provisions exist, the Covenant cannot prevail: see *R. v. Secretary of State for Home Affairs et al., Ex p. Singh*, [1975] 2 All E.R. 1081 at p. 1083 (Eng. C.A.); *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Com'n et al.*, [1978] 2 S.C.R. 141 at pp. 172-3 and pp. 187-8, 81 D.L.R. (3d) 609 at p. 631 and pp. 641-2, 36 C.P.R. (2d) 1 (S.C.C.); Peter W. Hogg, *Constitutional Law of Canada* (1977), at p. 186; John Claydon, "The Application of International Human Rights Law by Canadian Courts", 30 Buffalo L. Rev. 727 (1981), pp. 737-8. This rule of construction is based on the presumption that Parliament does not intend to act in violation of Canada's international obligations: M. Cohen and A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law", 61 Can. Bar Rev. 265 at p. 298 (1983).

The applicant submits that ss. 9 and 12 of the Charter are vague and ambiguous, and that this court should look to the Covenant for assistance in determining their meaning. It appears that the framers of the Charter looked to the Covenant when drafting the provisions of the Charter, and contemplated that the courts would resort to Canada's international human rights obligations to help to interpret the Charter: John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", 4 Supreme Court L.R. 287 at pp. 287-8 (1982). At least one commentator has recognized the assistance to be derived from the International Covenant when interpreting the Charter (E. G. Ewaschuk, Q.C., "The Charter: An Overview and Remedies", 26 C.R. (3d) 54 at p. 59):

> In addition to current Canadian law, resort for interpretative guidance may also be made to the International Covenant on Civil and Political Rights adopted by the United Nations in 1966, signed by the federal government in 1976 and agreed to by the provinces in the same year. Interpretations by the United Nations Human Rights Committee of similar provisions in the

> Covenant to those in the Charter may cast light on the minimal requirements imposed on the federal and provincial governments by the Charter. Similarly, it may prove useful to resort to decisions rendered under the European Human Rights Commission and Court. Recourse to the Covenant and the European Convention may also prove useful in identifying the kind of limits which may reasonably be imposed on Charter rights, since both documents specify in some detail limits which may be recognized as necessary in a democratic society.

See also M. L. Friedland, Q.C., "Legal Rights Under the Charter" (1981-82), 24 Crim. L.Q. 430 at p. 431.

I cannot accept the respondents' submission that ss. 9 and 12 of the Charter are clear and unambiguous, and that there is no need to resort to the Covenant in order to ascertain their meaning. In *Re Gittens and the Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152 (F.C.T.D.), Mr. Justice Mahoney identified three different approaches which have been used by Canadian courts since the enactment of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, to interpret the term "cruel and unusual punishment". Although the meaning of "arbitrary detention" may be somewhat less ambiguous, neither can the content of that phrase be regarded as completely clear. So long as the Charter's "capability for growth" is recognized by the courts, there will be room for new interpretations of the rights entrenched therein: see *Re Southam Inc. and The Queen (No. 1)*, unreported, judgment released March 31, 1983, at p. 16 [since reported 41 O.R. (2d) 113 at p. 123, 3 C.C.C. (3d) 515 at p. 524, 146 D.L.R. (3d) 408 at p. 418] (Ont. C.A.). As was urged by M. Cohen and A. Bayefsky, *supra*, at p. 305:

> In the context of the Charter, where considerable difficulty of interpretation will arise, and the conventions are potentially helpful, it would seem justifiable for our courts to lean against a narrow application of the ambiguity requirement and in favour of having recourse to these aids.

The applicant submits that ss. 9 and 12 of the Charter must be interpreted in light of the last sentence of art. 15, para. 1 of the International Covenant:

> ARTICLE 15
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

I agree with the applicant that a sentence of preventive detention should be regarded as a "penalty" within the meaning of art. 15:

see *Re Van Duzen* (April 23, 1982), United Nations Human Rights Committee Communication No. R. 12/50; *Coogans v. MacDonald*, 1954 S.L.T. 279 at p. 281.

However, there appears to be a conflict between another provision of the Charter and art. 15 of the Covenant, which prevents me from using art. 15 to help to determine the meaning of ss. 9 and 12. The last sentence in para. 1 of art. 15 gives an offender the right to the benefit of a lighter penalty when the penalty is changed subsequent to the commission of an offence. This provision appears to apply at *any* time after the commission of an offence, even after the offender has been sentenced: H.N.A. Noor Muhammad, "Due Process of Law for Persons accused of Crime" in *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), edited by Louis Henkin, p. 138 at p. 164.

On the other hand, however, s. 11(*i*) of the Charter of Rights guarantees a more limited right:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

This section gives the accused the advantage of the lesser penalty only if the change comes before he is sentenced — not any time after his conviction.

According to one observer, "This is a point on which the wording of s. 11(i) is very clear and contrasts . . . with art. 15 of the International Covenant on Civil and Political Rights": François Chevrette, "Protection Upon Arrest or Detention and Against Retroactive Penal Law" in *The Canadian Charter of Rights and Freedoms: Commentary* (1982), edited by W. S. Tarnopolsky (now Tarnopolsky J.A.) and G.-A. Beaudoin, at p. 330.

Section 11(*i*) of the Charter is consistent with s. 36(*e*) of the *Interpretation Act*, R.S.C. 1970, c. I-23:

> 36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,
>
> . . . . .
>
> (*e*) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

Thus, under Canadian law as it stood prior to the enactment of the Charter, there was no generally applicable statutory provision enabling a person convicted of an offence to be given a reduced penalty if, at any time following *conviction*, a new statute provided for a lighter penalty; convicted persons could benefit from such a reduction only if punishment were imposed after the repeal or if it was expressly provided for in the statute: *International Covenant on Civil and Political Rights: Report of Canada on Implementation of the Provisions of the Covenant* (1979), at p. 73. Hence, at the present time, the benefit of the lesser punishment extends beyond conviction until the time of sentencing, but no further. Even if "time of sentencing" includes the determination of a final appeal as to sentence, it does not assist the applicant in this case because his application for leave to appeal to the Supreme Court of Canada was dismissed prior to the enactment of the new dangerous offender provisions.

I must conclude (with some reluctance) that I cannot look to art. 15 of the International Covenant for assistance in interpreting ss. 9 and 12 of the Charter, due to the conflict between art. 15 and s. 11(i). I do, however, recognize that in other cases it may be appropriate and desirable to have regard to the International Covenant when interpreting provisions of the Charter.

IV. *Arbitrary detention or imprisonment*

The applicant submits that on the facts of this case, to have his detention under sentence of preventive detention continued is to be "arbitrarily detained or imprisoned", contrary to s. 9 of the Charter.

Canadian courts have sought to define the word "arbitrary" since the enactment of the *Bill of Rights*. For example, in *R. v. Roestad*, [1972] 1 O.R. 814, 5 C.C.C. (2d) 564, 19 C.R.N.S. 190 (Ont.Co.Ct.), His Honour Judge Graburn relied upon the Concise Oxford Dictionary which defined "arbitrary" as meaning "derived from mere opinion; capricious; unrestrained; despotic; or discretionary" (p. 817 O.R., p. 567 C.C.C.). Similarly, in *Levitz v. Ryan*, [1972] 3 O.R. 783, 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519 (Ont. C.A.), Mr. Justice Arnup held that "arbitrary" means "unreasonable or capricious" (p. 790 O.R., p. 189 C.C.C., p. 526 D.L.R.). These approaches have been followed by courts considering the meaning of s. 9 of the Charter. In *R. v. Simon* (1982), 68 C.C.C. (2d) 86, 137 D.L.R. (3d) 231, [1982] 4 W.W.R. 71 (N.W.T.S.C.), Mr. Justice de Weerdt examined the definitions of "arbitrary" set out in *Roestad* and *Levitz*, and W. S. Tarnopolsky's conclusion as to the meaning of the phrase "arbitrary detention, imprisonment or exile" in s. 2(*a*) of the *Bill of Rights*:

> "... the proscription here is against detention, imprisonment or exile without specific authorization under existing law. And further, that a law giving power to detain, imprison or exile, cannot grant such a power to be exercised 'unreasonably' or 'without just cause'."

(W. S. Tarnopolsky [*Canadian Bill of Rights*, 2nd revised ed. (1975), p. 235] in *Simon* at p. 90 C.C.C., p. 236 D.L.R.) His Lordship concluded that arbitrary detention must mean detention which is unreasonable or unjustifiable, or without any rational foundation, in all of the circumstances of the case (at pp. 90-2 C.C.C., pp. 236-8 D.L.R.).

Certain other cases decided since the enactment of the Charter have given considerable attention to the lawfulness of procedures used to detain accused persons. In *R. v. Newall et al. (No. 4)* (1982), 70 C.C.C. (2d) 10, 141 D.L.R. (3d) 26, 2 C.R.R. 156, the Supreme Court of British Columbia held that s. 9 of the Charter (p. 19 C.C.C., p. 36 D.L.R.):

> "... is meant to allow the release from incarceration of someone who is wrongly there because the order detaining him was made arbitrarily as compared to judicially. Because I am sentencing each accused in accordance with the law, their subsequent imprisonment is not arbitrary.

In *R. v. Frankforth* (1982), 70 C.C.C. (2d) 448, His Honour Judge MacKinnon of the British Columbia County Court considered the situation of an accused who was being held in custody pursuant to s. 457(5.1) of the *Code*. He concluded that because the accused was not being detained at the whim of the court, but rather by specific procedures enacted by Parliament, his right under s. 9 had not been violated. Mr. Justice Griffiths of the Supreme Court of Ontario reached a similar conclusion in *R. v. McGregor* (unreported, judgment released February 1, 1983 [since reported 3 C.C.C. (3d) 200, 145 D.L.R. (3d) 489]). His Lordship concluded that the taking of fingerprints did not involve any element of arbitrariness (pp. 15-6 [p. 210 C.C.C., p. 499 D.L.R.]):

> The police were not acting in some unreasonable or capricious manner but were simply requiring the respondent to submit to fingerprinting as required by law. In my view, detention by a police officer under the authority of a statute cannot be considered "arbitrary".

These decisions must be interpreted with some caution. In my opinion, they should not be construed to mean that simply because a statute sets out a specific procedure for detaining a person, that statutory procedure is automatically free from arbitrariness. It may be that certain sentencing or detention procedures authorized by statute are *prima facie* capricious or unreasonable. The right to attack such a procedure under s. 9 should not be foreclosed by the fact that the procedure is set out in a statute, and followed by a judge, for to do so would be to ignore s. 52 of the Charter. The procedure itself must be scrutinized in order to determine whether it is arbitrary in the sense of being capricious, unreasonable, or unjustifiable.

The applicant has urged this court to consider his submission that his continued detention is arbitrary in light of the Ontario Court of Appeal decision in *R. v. Saxell* (1980), 33 O.R. (2d) 78, 59 C.C.C. (2d) 176, 123 D.L.R. (3d) 369, and a study of habitual criminals prepared by Professor Michael Jackson of the University of British Columbia Law School: *Sentences That Never End: The Report on The Habitual Criminal Study* (1982). In *Saxell*, the court dismissed the appellant's argument that to detain him for an indefinite period of time following acquittal on account of his insanity at the time of the commission of the offence would be arbitrary. Mr. Justice Weatherston based that conclusion on the fact that there was no evidence before the court that persons such as the appellant continued to be held in custody after they ceased to be a danger to the public (p. 86 O.R., p. 184 C.C.C., p. 377 D.L.R.). The applicant submits Professor Jackson's report as evidence of the fact that most habitual criminals continue to be detained despite the fact they do not qualify as dangerous offenders under the new legislation.

Jackson's report focused upon 18 men who were declared habitual criminals and sentenced to preventive detention under the old provisions of the *Code*, and who were still incarcerated as of September, 1980. Jackson reached 10 conclusions, which included the following (at pp. 27 and 34):

> 1. The great majority of the men in the study have always been regarded as no more than grave social nuisances and have never been regarded as dangerous in terms of their propensity to commit violence.
>
> 2. None of the men in the study can properly be regarded as dangerous offenders within the definitions of the 1977 dangerous offender legislation.
>
> 3. The Parole Board, in concluding its annual reviews since 1977, has not conducted those reviews against the new formulation of the dangerous offender.
>
> 4. Parole reviews of the men in the study, both before and after 1977, have been and are conducted against the legislative criteria of section 10 of the *Parole Act* in which danger to society is only one of the relevant criteria.

Although Professor Jackson's study demonstrates very clearly the unfairness involved in continuing to detain habitual criminals who are not dangerous according to the present provisions of the *Code*, it does not assist me in the determination of whether *this* applicant's continued detention is arbitrary. Section 695.1(2) of the *Code* requires the National Parole Board to review the applicant's condition, history and circumstances once every year for the purpose of determining whether he should be granted parole. Section 10(1)(*a*) of the *Parole Act*, R.S.C. 1970, c. P-2, apparently guides the Board in making that decision:

> 10(1) The Board may
>
> (*a*) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that
>
> (i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment,
>
> (ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and
>
> (iii) the release of the inmate on parole would not constitute an undue risk to society;

The statutes thus provide for mandatory review of a habitual criminal's continued detention, governed by clearly defined standards. I cannot find that there is anything inherently capricious or unreasonable about this procedure. Since no evidence has been adduced by the applicant with respect to what criteria the Board in fact employs to review his detention, I cannot find that the continued detention of this applicant contravenes s. 9 of the Charter. The only evidence that I have before me of how the Parole Board exercises its discretion with regard to this applicant, is the applicant's criminal record, which demonstrates that he has been released on parole on two occasions since 1970. As a result, I must hold that the applicant has failed to establish a *prima facie* violation of his right not to be arbitrarily detained or imprisoned, pursuant to s. 9 of the Charter.

V. *Cruel and unusual treatment or punishment*

The applicant also submits that his continued incarceration under sentence of preventive detention infringes upon his right not to be subjected to any cruel or unusual treatment or punishment.

The first issue to be determined is whether detention pursuant to a sentence of preventive detention constitutes "treatment or punishment". In *Roestad, supra*, His Honour Judge Graburn treated the preventive detention of a dangerous sexual offender as punishment, because there was a loss of liberty (p. 825 O.R., p. 574 C.C.C.). However, in *Saxell*, Mr. Justice Weatherston held that detention at the pleasure of the Lieutenant-Governor following acquittal by reason of insanity, "is not punishment at all, but is for the protection of the public and the treatment of the accused" (p. 91 O.R., p. 188 C.C.C., p. 382 D.L.R.). It also has been held that deportation, and the imposition of a suspended sentence, do not constitute "punishment": see *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152, and *R. v. Linklater*, unreported, judgment given December 18, 1982 (Y.T.S.C.).

I am of the view that detention of habitual criminals is "punishment", even though its primary purpose is the protection of the public (see *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39 at p. 43, 21 C.C.C. (2d) 201 at p. 206, 54 D.L.R. (3d) 419 at p. 424), but, even if it is not, then it certainly constitutes "treatment". With respect to s. 12 of the Charter, A.D. Gold has commented:

> Note that "treatment" as well as "punishment" may attract this section's protection. Treatment generally covers any conduct, behaviour or action towards another and, consequently, any disadvantaging of a person, not just that commonly considered punishment, can be attacked as violating this prohibition.

(A.D. Gold, *Annual Review of Criminal Law, 1982* (1982), p. 21.) Deportation, although not punishment, is an example of "treatment" within the meaning of s. 12: see *Re Gittens* at p. 444 C.C.C., p. 693 D.L.R.

The next issue to be examined is the meaning of the phrase "cruel and unusual". In *Re Gittens*, three approaches to defining cruel and unusual treatment or punishment were identified. One approach is to read "cruel and unusual" disjunctively. In *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401, 63 D.L.R. (3d) 193, [1975] 6 W.W.R. 1 (B.C.C.A.), Mr. Justice McIntyre, in his dissent, stated that [at p. 465 C.C.C., p. 257 D.L.R.]:

> . . . it is permissible and preferable to read the words "cruel" and "unusual" disjunctively so that cruel punishments however usual in the ordinary sense of the term could come within the proscription.

This test was followed by Mr. Justice Heald in *McCann et al. v. The Queen et al.* (1975), 29 C.C.C. (2d) 337, 68 D.L.R. (3d) 661, [1976] 1 F.C. 570 (F.C. T.D.).

The second approach is to read "cruel and unusual" conjunctively. Mr. Justice Ritchie, writing for the majority of the Supreme Court of Canada in *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680 at p. 706, 31 C.C.C. (2d) 177 at p. 197, 70 D.L.R. (3d) 324 at p. 345 (S.C.C.), held that:

> . . . the words "cruel and unusual" as they are employed in s. 2(*b*) of the *Bill of Rights* are to be read conjunctively and refer to "treatment or punishment" which is both cruel and unusual.

His Honour Judge Graburn took the same approach in *Roestad*. According to his theory, then, before s. 2(*b*) of the *Bill of Rights* can apply, the punishment must be *both* cruel *and* unusual.

The last approach taken by Canadian courts is to treat the words "cruel and unusual" as one compendious expression. In his minority judgment in *Miller and Cockriell* (S.C.C.), Chief Justice Laskin stated [at pp. 689-90 S.C.R., p. 184 C.C.C., p. 332 D.L.R.]:

> The various judgments in the Supreme Court of the United States, which I would not discount as being irrelevant here, do lend support to the view that "cruel and unusual" are not treated there as conjunctive in the sense of requiring a rigidly separate assessment of each word, each of whose meanings must be met before they become effective against challenged legislation, but rather as interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm. I think this to be a reasonable appraisal, in line with the duty of the Court not to whittle down the protections of the *Canadian Bill of Rights* by a narrow construction of what is a quasi-constitutional document.

In *Re Gittens* Mr. Justice Mahoney adopted the reasoning of Chief Justice Laskin. A similar approach was taken by Mr. Justice Arnup in *R. v. Shand* (1976), 13 O.R. (2d) 65, 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395, 35 C.R.N.S. 202 (Ont. C.A.). In that case, His Lordship held that [at p. 80 O.R., p. 38 C.C.C., p. 410 D.L.R., p. 221 C.R.N.S.]:

> . . . there is a "core meaning" to the phrase "cruel and unusual treatment or punishment". It has yet to be distilled and enunciated in Canada. In provincial Courts of Appeal, that process will best be carried out on a case by case basis.

I have decided to follow the last approach in deciding whether the continued detention of the applicant constitutes cruel and unusual treatment or punishment. The words of Chief Justice Laskin, advising against whittling down the protections of the *Bill of Rights* by narrow interpretations, apply with even greater force to the Charter of Rights:

> The Charter as part of a constitutional document should be given a large and liberal construction. The spirit of this new "living tree" planted in friendly Canadian soil should not be stultified by narrow, technical, literal interpretations without regard to its background and purpose; capability for growth must be recognized . . .

(*Re Southam Inc. and The Queen (No. 1)*, unreported, judgment released March 31, 1983, at p. 16 [since reported 41 O.R. (2d) 113 at p. 123, 3 C.C.C. (3d) 515 at p. 524, 146 D.L.R. (3d) 408 at p. 418] (Ont. C.A.), *per* MacKinnon A.C.J.O.)

What, then, is the "core meaning" of the right guaranteed by s. 12 of the Charter? When is treatment or punishment cruel and unusual? As indicated above, Canadian courts have not approached this issue in any uniform fashion. However, one recurring theme in Canadian case law dealing with s. 2(*b*) of the *Bill of Rights* is resort to American authorities and the "disproportionality principle".

In his dissent in *Miller and Cockriell* (B.C.C.A.) Mr. Justice McIntyre looked to American authorities to assist him to determine the nature of cruel and unusual punishment. His Lordship recognized that, while American law did not bind him, and rested upon a different constitutional basis, it was helpful in determining principles upon which the matter before him should be considered. He observed that it was necessary to settle upon certain standards by which the punishment in question should be judged. His Lordship concluded that the punishment under scrutiny, the death penalty,

> . . . would amount to cruel and unusual punishment if it cannot be shown that its deterrent value outweighs the objections which can be brought against it. Furthermore, even assuming some deterrent value . . . it would be cruel and unusual if it is not in accord with public standards of decency and propriety, if it is unnecessary because of the existence of adequate alternatives, if it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain.

(Page 468 C.C.C., p. 260 D.L.R.)

This test was followed by Mr. Justice Heald in *McCann*. In that case, His Lordship found that solitary confinement constituted cruel and unusual punishment, because it served no positive penal purpose. Furthermore, it was unnecessary because of the existence of adequate alternatives, and thus was not in accordance with public standards of decency and propriety. The punishment also was found to be unusually severe in nature.

In *Shand*, Mr. Justice Arnup also recognized that "great assistance can be obtained from the American precedents" in attempting to define what is cruel and unusual punishment (p. 79 O.R., pp. 37-8 C.C.C., p. 409 D.L.R., p. 220 C.R.N.S.):

> We recognise that there could be a punishment imposed by Parliament that is so obviously excessive, as going beyond all rational bounds of punishment in the eyes of reasonable and right-thinking Canadians, that it must be characterised as "cruel and unusual". Therefore, we are prepared to accept that the so-called "disproportionality principle", in this sense, has relevance to what is cruel and unusual punishment, but it is a principle that needs to be developed in the Canadian context of our constitution, customs and jurisprudence.

The court held that a minimum sentence of seven years' imprisonment for importing a narcotic was not so disproportionate to the offence as to be cruel and unusual, in view of the magnitude of the national evil at which the penalty was aimed.

Chief Justice Laskin's dissenting judgment in *Miller and Cockriell* (S.C.C.) probably provides the best example of how the Canadian judiciary has utilized American authorities to assist in determining the meaning of the right to protection against cruel and unusual treatment or punishment. The Chief Justice attempted to summarize the effect of the words of s. 2(*b*) of the *Canadian Bill of Rights*, with reference to the English *Bill of Rights* and the Eighth Amendment to the American Constitution. He found that the words of s. 2(*b*) could not be limited only to methods of punishment. Section 2(*b*) must also apply to the excessiveness of a penalty (p. 688 S.C.R., p. 183 C.C.C., p. 331 D.L.R.):

> Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(*b*), but I doubt whether a more precise one can be found.

Chief Justice Laskin then proceeded to consider the arguments in the case before him. The appellants' arguments in the Supreme Court of Canada were based upon the judgments of Mr. Justice Brennan of the Supreme Court of the United States in *Furman v. Georgia* (1972), 408 U.S. 238, and *Gregg v. State of Georgia* (1976), 96 S. Ct. 2909. The appellants offered four grounds of challenge to the death penalty based upon those judgments, namely, that:

> (1) the death penalty is unusually severe and hence degrading to human dignity and worth; (2) it is arbitrarily imposed; (3) it is not acceptable to a large segment of the population and (4) it is excessive in that it cannot be shown that it has had any deterrent effect on murder that would not be realised by a punishment that was not so final.

(Page 692 S.C.R., p. 186 C.C.C., p. 334 D.L.R.)

Chief Justice Laskin rejected the argument based upon arbitrary imposition, because the *Criminal Code* provided that imposition of the death penalty was mandatory for capital murder. He also dismissed the claim that the penalty was unacceptable to a large segment of the Canadian population, because that argument appeared to be asking the court "to define and apply s. 2(*b*) by a statistical measure of approval or disapproval of the death penalty" (p. 692 S.C.R., p. 187 C.C.C., p. 334 D.L.R.). He did not believe that that was what s. 2(*b*) called for.

The Chief Justice dealt with the remaining two grounds together. The appellants based the arguments of severity and excessiveness upon the reasons of Justice Brennan in *Furman*. In that case, Justice Brennan propounded a cumulative test for determining whether a punishment is cruel and unusual (at p. 282):

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society,

> and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Chief Justice Laskin was prepared to adopt a less stringent test than that set forth above. He accepted the appellants' submission that if severity and excessiveness alone were established, that would be enough to sustain their attack on the death penalty (pp. 693-4 S.C.R., pp. 187-8 C.C.C., p. 335 D.L.R.).

The Chief Justice approached the submission that the death penalty was excessive and unduly severe in terms of proportionality (p. 694 S.C.R., p. 188 C.C.C., p. 335 D.L.R.):

> What we are concerned with here is not mere degradation by which society expresses its reprobation of criminal behaviour but *the extent of it, related of course to the offence and at times to the offender*. The enormity and the irreversibility of a death penalty when carried out certainly bespeak its undue severity in the abstract, but the present case is concerned with *proportionality*, with mandatory application of the death penalty not to an entire range of the most heinous offences, that is, murder, but to particular and narrow instances of it specially selected by Parliament as meriting the drastic penalty of death.

(My emphasis.)

His Lordship rejected the appellants' arguments that the death penalty was excessive because the purposes of punishment would be equally well served by providing for a lesser punishment. Chief Justice Laskin found that a social purpose beyond mere vengeance was served by the mandatory death penalty, and that there was no convincing proof that deterrence had had no impact. The death penalty thus did not constitute cruel and unusual punishment within s. 2(*b*) of the *Bill of Rights*.

The majority of the Supreme Court of Canada took a very different approach. The court held that since Parliament had re-enacted the death penalty provisions of the *Code* after the *Bill of Rights* was proclaimed, Parliament must not have intended s. 2(*b*) to preclude punishment by death. Mr. Justice Ritchie, in his majority judgment, did not attempt to define the meaning of "cruel and unusual treatment or punishment" beyond holding that "cruel and unusual" should be read conjunctively. Since imposition of the death penalty for murder was not "unusual", capital punishment could not constitute cruel and unusual punishment. Furthermore, since the American Constitution and the *Canadian Bill of Rights* "differ so radically in their purpose and content", Mr. Justice Ritchie found American authorities to be of little value in interpreting s. 2(*b*) (pp. 706-7 S.C.R., p. 198 C.C.C., p. 345 D.L.R.).

The cases decided pursuant to the Charter of Rights have not dealt with the meaning of s. 12 in any detail. For example, in *R. v. Simon (No. 3)* (1982), 69 C.C.C. (2d) 557, 141 D.L.R. (3d) 380, [1982] 5 W.W.R. 728, the Supreme Court of the Northwest Territories simply adopted the decision of the Supreme Court of Canada in *Ex parte Matticks* (1973), 15 C.C.C. (2d) 213n, [1973] S.C.R. vi *sub nom. Pearson v. Lecorre*. Since the decision of the Supreme Court in *Matticks* consisted of a bare conclusion that s. 688 of the *Code* was not rendered inoperative by the *Bill of Rights*, this decision is of little assistance in attempting to define the meaning of cruel and unusual treatment or punishment. Similarly, in *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438, 137 D.L.R. (3d) 687, [1983] 1 F.C. 152, the Federal Court did not define cruel and unusual treatment beyond adopting Chief Justice Laskin's statement that it should be treated as one compendious expression. In *Collin et al. v. Kaplan et al.* (1982), 1 C.C.C. (3d) 309, 143 D.L.R. (3d) 121, 2 C.R.R. 352 (F.C.T.D.), Mr. Justice Dube dismissed an application for an interlocutory injunction based upon allegedly cruel and unusual treatment or punishment in Canadian penitentiaries, without commenting upon the meaning of s. 12 of the Charter beyond quoting from and following the general import of an American decision dealing with a similar situation.

The absence of any definitive judicial pronouncements with respect to the meaning of the right guaranteed by s. 12 of the Charter has forced me to come to my own conclusions as to its scope and effect. I find the tests proposed by Chief Justice Laskin in *Miller and Cockriell* and by Mr. Justice Arnup in *Shand* to be of the greatest assistance in this respect. In my opinion, the standard to be applied in determining whether treatment or punishment is cruel and unusual is whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. The test, thus, is one of disproportionality: is this treatment or punishment disproportionate to the offence and the offender? Evidence that the treatment or punishment is unusually severe, and excessive in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment, will suffice to satisfy the test of disproportionality. Evidence of arbitrary imposition also is relevant, but not a prerequisite to a finding of disproportionality where the other two factors are present. I agree with Chief Justice Laskin that public opinion should not play a part in the determination.

The question to be determined in this case is whether the continued detention of *this applicant* constitutes cruel and unusual punishment or treatment. The imposition of an indeterminate sentence *per se* is not under attack. In considering this question, I will proceed on the premise that the applicant can be shown to be no danger to society, and that, under the present law, he could not be found to be a dangerous offender.

The first matter to be considered is the severity of the applicant's treatment. The applicant has been in preventive detention since 1970. Between 1970 and 1983 he has been out of custody on parole for approximately one year in total. Thus, the applicant has already been incarcerated as a consequence of the habitual criminal finding for approximately 12 years. What other *Criminal Code* offences carry maximum sentences of this length? Sexual assault (s. 246.1), criminal negligence causing bodily harm (s. 204), theft over $200 (s. 294(*a*)) and fraud over $200 (s. 338(1)(*a*)) all carry maximum sentences of 10 years' imprisonment. Wounding (s. 228), aggravated assault (s. 245.2) and sexual assault with a weapon (s. 246.2) are examples of offences carrying maximum sentences of 14 years' imprisonment. Continuing to detain a person found to be a habitual criminal as a result of property offences mainly involving amounts under $50, for an indeterminate period of time in excess of 12 years, surely must be unduly severe in light of the maximum limits of punishment for serious *Code* offences. The Jackson study reinforces my conclusion in this regard. Jackson found that the habitual criminals who were the subjects of his study had "served more time than any other group of prisoners in Canada, including those convicted of murder" (p. 45).

The next matter to be examined is whether the continued detention of the applicant is excessive, in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment. The purpose of the old *Code* provisions providing for preventive detention of habitual criminals was the protection of the public: see *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39 at p. 43, 21 C.C.C. (2d) 201 at p. 205, 54 D.L.R. (3d) 419 at p. 424. However, the Ouimet Report demonstrated that the public did not need to be protected from many of the persons being detained as habitual criminals, since they were primarily social nuisances, rather than menaces to the safety of the public (p. 252). Jackson reached a similar conclusion (at p. 27). Apparently this was the reason for the changes in the legislation.

If protection of the public is no longer a valid penological purpose for continuing to detain habitual criminals who are not dangerous, then what is the basis for their detention? The Ouimet Committee found the general deterrent effect of the habitual offender legislation to be "necessarily slight" due to its infrequent application (p. 247). In view of the fact that the legislation has been repealed, I do not see how it can have *any* general deterrent effect at the present time. If individual deterrence is the purpose, then surely 12 years in custody has more than fulfilled this aim. If the applicant has not been deterred by 12 years of detention, then it is doubtful that he will be deterred by any further incarceration. With respect to the other possible purposes of punishment, I adopt the conclusions reached by Jackson (at pp. 49-50):

> In terms of the retributive purposes of punishment . . . it is quite clear that these men have paid over and over again for the harm they have caused and the retributive purpose of punishment has long since been fulfilled. Finally, in terms of reformation, it is equally clear that further incarceration makes the already extremely difficult task of reintegration into the community all the more difficult.

Thus, in the event that this applicant is *not* a menace to society, I conclude that his continued detention for an indefinite time is excessive.

The last factor to be considered is that of arbitrariness. Although the Ouimet Report and Jackson study demonstrate the arbitrariness often involved in the initial imposition of preventive detention (see Ouimet Report at pp. 252-3, and Jackson study at pp. 47-8), there is no evidence before me that this applicant's *continued* detention has been tainted by arbitrariness. As a result, I do not find this factor to be of assistance to the applicant.

On the basis of the factors examined above, I find that the continued detention of the applicant, if in fact he is no more than a social nuisance and not a danger to the public, satisfies the disproportionality test. To continue to detain such a man for more than 12 years surpasses all rational bounds of treatment or punishment, and is so excessive as to outrage standards of decency. The applicant's right to protection against cruel and unusual treatment or punishment thus may have been infringed. Since no evidence has been adduced to satisfy me that such an infringement constitutes a reasonable limit demonstrably justifiable in a free and democratic society, I find that the applicant may be entitled to relief pursuant to s. 24(1) of the Charter, subject to my comments below.

VI. *Remedy*

The relief sought on this application is either the issuance of a writ of *habeas corpus* directing the release of the applicant, or a

s. 24(1) remedy. If the applicant's right under s. 12 of the Charter has in fact been infringed, then his continued detention would be unlawful, and a basis for the issuance of a writ of *habeas corpus*, or for a remedy under s. 24, thus would be established. The problem in this case is that the evidence before this court makes it impossible for me to determine whether s. 12 has been contravened. The determination that the applicant's continued detention is disproportionate, and thus in violation of s. 12, depends upon a finding that he is not a danger to society. I am unable to make such a finding on the evidence before me at this time. In the absence of a determination that the Charter has been infringed, no remedy can be granted pursuant to s. 24.

Although I am not prepared to grant the relief requested, namely, an order releasing the applicant from custody, neither am I prepared to dismiss his application. I have concluded that an alternative remedy open to me is to direct that the applicant remain in custody pending the trial of an issue to determine whether he is a danger to society within the meaning of s. 688 of the present *Criminal Code*. My jurisdiction in this regard is found in s. 709 of the *Code*. Pursuant to s. 709, a court hearing an application for *habeas corpus* has the power to order further detention of the applicant and to direct that further proceedings be taken to further the ends of justice:

> *Detention on inquiry to determine legality of imprisonment*
>
> 709. Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or magistrate under whose warrant he is in custody, or any other judge, justice or magistrate to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.

I am of the opinion that an order under s. 709 can be made on this application. The words "by reason that he . . . has been convicted of an offence" should not be construed so as to exclude a person who has been found to be a habitual criminal, since that finding could only be made following a conviction of an indictable offence: see s. 660 of the *Criminal Code*, 1953-54 (Can.), c. 51 (as amended 1960-61, c. 43, s. 33(1)). Furthermore, an order under s. 709 can be made either after a finding that the detention of the applicant is unlawful (*Re Baker and The Queen* (1981), 60 C.C.C. (2d) 476, 23 C.R. (3d) 52 (B.C.S.C.); *Re Ferreira and The Queen* (1981), 58 C.C.C. (2d) 147, [1981] 3 W.W.R. 737 (B.C.C.A.)), or without determining the legality of the applicant's detention (*Kenny v. A.-G. Can. et al.*, [1977] 5 W.W.R. 393 (B.C.S.C.)). At this time, I am not prepared to determine whether the applicant's right under s. 12 has been infringed, and thus the legality of his detention cannot be determined until the issue has been tried.

VII. *Order*

The terms of my order are as follows. The applicant may apply to this court to fix a date for the continuation of proceedings before me, if, within 60 days from the date of this order, the Parole Board has not released the applicant from custody, and no appeal from this order has been commenced. At the continuation of this application, the onus shall be upon the applicant to establish that he is not a danger to society. The respondents shall have the right to participate fully in the proceedings. If the applicant succeeds in satisfying me that he is not dangerous, this court shall determine the appropriate remedy to be granted, pursuant either to the application for a writ of *habeas corpus*, or the application for relief under s. 24(1) of the Charter.

Judgment accordingly.

REGINA v. WOSZCZYNA
REGINA v. SOUCY

Ontario Court of Appeal, Martin, Weatherston and Robins JJ.A. June 8, 1983.

Prostitution — Keeping common bawdy-house — Accused owner and directing mind of corporation running steam-bath — Steam-bath found to be common bawdy-house — Evidence that accused participated in management of premises, received proceeds from operation and hired and paid staff and other expenses — Evidence that accused aware of activities on premises — Whether accused may be convicted of keeping common bawdy-house — Whether Crown required to prove that accused participated in day-to-day running of premises — Cr. Code, ss. 179, 193.

An accused is properly convicted of the offence of keeping a common bawdy-house contrary to s. 193(1) of the *Criminal Code* where the evidence indicates that he was the owner and directing mind of a corporation which operated a steam-bath found by the trial judge to be a common bawdy-house and that he participated in the management of the premises, received the proceeds from the operation of the business, hired and paid staff and paid other operating expenses out of those proceeds and was aware of the activities being carried on in the premises. In such circumstances there is no requirement that the Crown also establish that the accused participated in the day-to-day running of the premises.

IN THE SUPREME COURT OF ONTARIO

(Action commenced in the County of Frontenac)

BETWEEN:

PERCY WAYNE MITCHELL

Applicant

- AND -

THE CROWN

Respondent

REASONS FOR JUDGMENT

DELIVERED ORALLY BY THE HONOURABLE ALLEN M. LINDEN
on October 21, 1983

APPEARANCES

For the Applicant	Ronald Price, Esquire
For the Crown - Respondent	Brian Everndon, Esquire

This is the continuation of an application brought by Percy Wayne Mitchell for a writ of habeas corpus ad subjiciendum with certiorari in aid, or for relief pursuant to section 24(1) of the Charter of Rights.

I BACKGROUND

The first part of this application was heard on April 12th, 1983. At that time, the applicant invited this Court to find that his continued incarceration pursuant to a sentence of preventive detention violates his rights to be protected against cruel and unusual treatment or punishment, and not to be arbitrarily detained. On July 7th, I held that the continued detention of the applicant violates section 12 of the Charter of Rights, if he is not a danger to society. Accordingly, I ordered that pursuant to section 709 of the Criminal Code, R.S.C. 1970, Chap. C-34, further evidence should be heard for the purpose of determining whether, in fact, the applicant is dangerous. I held that the onus rests upon the applicant to demonstrate to this Court that he is not a danger to society. That onus is on a balance of probabilities. It is up to the applicant to establish circumstances that would lead

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this Court to conclude that to continue to detain him as a habitual criminal for an indeterminate period constitutes cruel and unusual treatment or punishment in violation of section 12 of the Charter.

Although after my ruling of July 7th the Parole Board reviewed the applicant's detention, it once again denied him parole. I am not sitting in review of that decision, nor have I been asked to determine whether the Parole Board has erred in any way.

II THE EVIDENCE

One cannot help but be saddened by the applicant's tale of a largely wasted life. The applicant, who suffers from skin cancer, is sixty-one years old. He has passed the bulk of his adult life incarcerated in various institutions, as a result of convictions for numerous offences. Although most of those offences were of a relatively minor nature, he has also been convicted of some rather serious crimes.

The applicant has spent most of the last fourteen years in prison. Approximately twelve of those years have been served pursuant to a sentence of preventive detention. That sentence was imposed in August of 1970, following a finding that the applicant is a habitual criminal. During those past fourteen

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The applicant has spent most of the last fourteen years in prison. Approximately twelve of those years have been served pursuant to a sentence of preventive detention. That sentence was imposed in August of 1970, following a finding that the applicant is a habitual criminal. During those past fourteen years, he has been at large for approximately one year in total. He worked for six months during one period of liberty, but committed another offence and was sent back to the institution where he is presently incarcerated.

The evidence discloses that for at least the last sixteen months, the applicant has been a model inmate at the Joyceville Penitentiary. Several persons from the penitentiary staff gave testimony on the applicant's behalf.

Herbert Smith, the inmate induction officer and "employer" of the applicant within the penitentiary, testified that he has complete trust in the applicant. There have been no thefts during Smith's tenure in office, and he has had no cause to reprimand the applicant for his conduct. Smith also testified that the applicant is one of only five inmates out of approximately four hundred and eighty who have been given security clearance passes which permit them to go anywhere within the institution. Smith had nothing negative to say about the applicant.

Joseph Burt, a living-unit officer who looks after the needs of the applicant and seven other inmates, described the applicant as a "model inmate" who has never been menacing to anyone. Burt testified that he would like to have seven more inmates like the applicant.

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Joseph Corrigan, the assistant warden of Joyceville Penitentiary, testified that he is a former "employer" of the applicant within the institution. Corrigan found the applicant to be a dependable worker who could be counted on to do his job. He views the applicant as a stabilizing influence on the other inmates. According to Corrigan, the applicant is not at all violent, and does not appear to use drugs or alcohol, unlike many of the other inmates.

Dr. Robert McCaldon, a psychiatrist who devotes half of his professional career to working with inmates in the various penal institutions in the Kingston area, also testified on the applicant's behalf. In Dr. McCaldon's opinion, the applicant does not satisfy the criteria of dangerousness set out in the present section 688 of the Criminal Code. His opinion was based upon an interview with the applicant and an examination of the record of the applicant's conduct within the penitentiary. Dr. McCaldon indicated that although his forecast that the applicant would not be a danger to society if released could not be relied upon as being one hundred percent certain, his forecasts are accurate about seventy percent of the time. Furthermore, his views are deserving of additional weight because of his experience with inmates of penal institutions.

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The applicant himself took the stand to explain some of his prior conduct. He admitted that as a young man he had a "short fuse" which sometimes resulted in violent behaviour. The applicant further testified, however, that he no longer resorts to violence. He explained that he was once warned by a police officer, following a fight in which he seriously injured another person, that he could end up killing someone if he continued to engage in such conduct. This seems to have left a lasting impression upon him. Dr. McCaldon's testimony confirmed this aspect of the applicant's evidence. Dr. McCaldon testified that the applicant had been exposed to a Dr. Bruno Cormier while he was in an institution in Montreal, and that he appears to have learned from him the foolishness of violence.

The applicant explained that the robbery offences for which he was convicted in the 1940's and 1950's did not involve the use of a weapon. The applicant committed the robberies by putting his hand in his pocket to make it appear that he had a gun. In fact, he was not armed. Since no evidence was called to contradict these assertions, I accept the applicant's version.

The applicant also explained the circumstances surrounding his conviction for assaulting a police officer. In that case, an officer who had not identified himself jumped upon

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the applicant, who claims merely to have defended himself.

Although the applicant also has been convicted of escaping from prison and attempted escape, the applicant's explanation of the circumstances surrounding the commission of these offences satisfies me that no violence was involved.

In general, there is nothing to indicate that the applicant has been violent in any way since 1960. It is clear, however, that he committed several property offences during that period, including one while he was on parole.

III RULING

As I indicated earlier, the original decision to sentence the applicant to preventive detention is not being challenged in this application. Rather, it is the continued detention of the applicant that is under attack.

Weighing all the evidence, I am satisfied that the applicant has demonstrated on a balance of probabilities that he is not dangerous according to the criteria contained in section 688 of the present Criminal Code. Finding, as I do, that there is no indication whatsoever that the applicant has done anything violent during the past twenty-three years, and that there is no danger of him doing violence to anyone in the future, I must conclude that his continued detention is dis-

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proportionate and thus in violation of section 12 of the Charter of Rights. To continue to detain this man, who is no more than a "social nuisance", for more than twelve years surpasses all rational bounds of treatment or punishment, and is so excessive as to outrage standards of decency. Such detention thus violates the applicant's constitutional right not to be subjected to cruel and unusual treatment or punishment.

Accordingly, I hold that the applicant's continued detention is illegal and in contravention of the Charter of Rights. The appropriate remedy is to grant the applications for a writ of habeas corpus, and for relief pursuant to section 24(1) of the Charter, and to order that the applicant be released as soon as the appropriate documents can be prepared and executed, and arrangements have been made for his return to his home in Montreal.

Although costs are sought by the applicant, I am not convinced that this is an appropriate case for making such an order. Normally, costs are not provided in a matter such as this. Although counsel for the applicant has expressed concern that if this matter is appealed by the Crown, the Quebec Legal Aid Plan may not be as helpful as Ontario Legal Aid has been, one hopes that the Crown would make arrangements to ensure that the applicant would continue to be represented, so that this issue would not be finally disposed of by a higher court without the benefit of full argument.

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IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE LINDEN) FRIDAY, the 21st day of
) October, 1983
IN SPECIAL SITTING, AT THE COURT HOUSE, KINGSTON)

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM WITH CERTIORARI IN AID THEREOF;

AND IN THE MATTER OF AN APPLICATION FOR A REMEDY UNDER SECTION 24(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS;

AND IN THE MATTER OF PERCY WAYNE MITCHELL, AN INMATE OF JOYCEVILLE INSTITUTION, CORRECTIONAL SERVICE OF CANADA.

ORDER

UPON THE APPLICATION of Percy Wayne Mitchell for a writ of habeas corpus and subjiciendum, with certiorari in aid thereof, with respect to his confinement at the Joyceville Institution, Correctional Service of Canada, pursuant to his continued imprisonment under sentence of preventive detention under the authority of a Mandat d'Emprisonnement signed at Montreal, in the Province of Quebec, by the Greffier de la Paixet de la Couronne, and dated the 25th day of August, 1970, and upon the further application of the said Percy Wayne Mitchell for a remedy under Section 24(1) of the Canadian Charter of Rights and Freedoms, in the presence of Counsel for the Applicant and for the Attorney General of Canada and for the Attorney General of Ontario, and having read the Affidavits filed by and on behalf of the Applicant and the Crown, and having heard the testimony of witnesses called by the parties, and having read the Order made on the 7th day of July, 1983 and entered the 5th day of August, 1983, and upon hearing what was said by Counsel aforesaid, and on consent this motion having been heard as an application for discharge of the prisoner as if the writ had been issued and returned:

1. IT IS ORDERED that the said Percy Wayne Mitchell is no longer subject to preventive detention under the authority of the aforesaid Mandat d'Emprisonnement signed at Montreal, in the Province of Quebec, by the Greffier de la Paixet de la Couronne, and dated the 25th day of August, 1970.

2. AND IT IS FURTHER ORDERED that insofar as the said Percy Wayne Mitchell is held in custody pursuant to the said Mandat d'Emprisonnement signed at Montreal, in the Province of Quebec, by the Greffier de la Paixet de la Couronne, and dated the 25th day of August, 1970, he be released therefrom and discharged from custody.

3. AND IT IS FURTHER ORDERED that there be no costs of this application.

GIVEN under my hand the seal of the Said Court this 21st day of October, A.D. 1983, at Kingston, Ontario.

Entered in Order Book at folio
No. 105 this 21st of October '83
Local Registrar, S.C.O.

"LOCAL REGISTRAR S.C.O."

POOR

QUALITY

ORIGINAL